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OCTOBER TERM, 1975

No. A-149

IN THE MATTER OF THE WITNESS
CHARLES G. BERRY, *Petitioner*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Charles G. Berry respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on August 1, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit and the two opinions of the United States District Court for the District of New Mexico, none of which have been reported, are reproduced in the Appendix hereto.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, entered on August 1, 1975, directed that no petition for rehearing may be filed,[2] and ordered the mandate stayed for a period of thirty (30) days in anticipation that petitioner would file

[1] Appendix, page 3a-19a, 24a-29a, 33a-43a.

[2] Appendix, page 43a.

this Petition for a Writ of Certiorari. This Court's jurisdiction is invoked under 28 USC § 1254(1).[3]

QUESTIONS PRESENTED

1. What necessity must be shown and what evidence of materiality must be produced to justify requiring a practicing attorney to deliver all financial records of the law firm of which he is a principal[4] to a federal grand jury in response to a subpoena duces tecum[5] when that subpoena has been challenged on the ground that it was overly broad and so unreasonable as to constitute an unlawful search and seizure under the Fourth Amendment?

2. When the financial records of a law firm, which include trust accounts for the handling of funds of clients by that firm pursuant to the attorney-client relationship, have been subpoenaed by a federal grand jury, may that law firm assert in behalf of said clients the Fifth Amendment right against self-incrimination as to those trust accounts?

3. Does the thirty day limitation provision of 28 USC § 1826(b)[6] deprive appellant of the right to appeal, where such time limitation does not permit inspection of exhibits and the appellate court could do no more than hurriedly review the transcript and the complex briefs?

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[3] 28 USC § 1254 provides, in part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

[4] The material portions of the subpoena are set forth in the Statement of the Case, *infra.*, pp. 4-5; and in full in the Appendix, pages 1a-2a.

[5] Appendix, pages 1a-2a.

[6] Appendix, page 58a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1826 of Title 28, United States Code, provides:

> *Recalcitrant witnesses*
>
> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
>
> (1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Added Pub.L. 91-452, Title III, § 301(a), Oct. 15, 1970, 84 Stat. 932

STATEMENT OF THE CASE

On April 21, 1975, a grand jury subpoena duces tecum was served on petitioner to deliver all financial records of the law firm of which he was a principal. The subpoena[7] commanded him to deliver:

"for the period from January 1, 1970 to the date of this subpoena [April 21, 1975], any and all financial records of any type or description which relate, either directly or indirectly, to the financial affairs of Marchiondo & Berry, P.A., any of its predecessor or successor entities or organizations and any entities or organizations which are, either directly or indirectly, affiliated or related to said Professional Association, its predecessor or successor entities or organizations, which records should include but not be limited to any and all books, ledgers, journals or records of any type relating to income and expenses from professional fees, legal fees or any other type of income: any and all bank statements, cancelled checks, deposit slips or passbooks relating to any checking or savings accounts of said organizations or entities;

[7] Appendix, pages 1a-2a.

and any and all records or correspondence of any type, not covered by the attorney-client privilege, with any person or entity relating either directly or indirectly to any of the above records, documents and objects."

Proceedings Below

Acting in behalf of himself and as an officer and director in behalf of the firm, petitioner contested the validity of the subpoena by Motion to Quash[8] (Tr. Vol. I, 3-59, 122, 123) and by refusal to deliver any records, asserting, among other things, that the subpoena was so overly broad and unreasonable as to constitute an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution (Tr. Vol. I, 122, 123), the Fifth Amendment right against self-incrimination on behalf of clients (Tr. Vol. IV, 369, 372-374; Vol. VIII, 830-834, 863-896) and illegal electronic surveillance (Tr. Vol. IV, 331-346; Vol. IX, 922-924; Vol. X, 984-996).

At the hearing on the Motion to Quash, the Assistant United States Attorney made an oral, unsworn proffer which set forth generally that the grand jury was investigating illegal campaign practices and desired to examine the law firm's records to determine if one of the firm's members, other than petitioner, had been guilty of "laundering" funds through the firm's accounts in order to make illegal campaign contributions (Tr. Vol. I, 13-25). Petitioner insisted that he be afforded an evidentiary hearing in which to challenge the sufficiency of the proffer. This was denied (Tr. Vol. I, 26-40, 89-94).

The proffer makes clear that if there is substance to these general allegations, the grand jury has sufficient information as to whom funds have been re-

[8] Appendix, pages 2a-3a.

ceived from, and to whom there have been contributions, to specify the particular records needed. Indeed, they have admitted they could specify:

> "There are specific pieces of evidence that the Grand Jury is interested in, which is evidence of criminal conduct, that are contained in these financial records." (Tr. Vol. VIII, 763).

However, they have refused to be specific because they are:

> ". . . also interested in looking at these records from a point of view of investigating, which is its function, the possibility of additional illegal conduct, evidence of which would be contained in these records." (Tr. Vol. VIII, 763).

At the conclusion of the hearing on the Motion to Quash, the District Court held that the subpoena was not overly broad and ordered petitioner to appear before the grand jury and deliver any records to which he asserted only a Fourth Amendment objection and deliver the remaining records to the court for an *in camera* inspection (Tr. Vol. I, 97). Petitioner at first refused to produce the records to either the grand jury or to the court. This was because the trial court had approved a procedure suggested by the United States Attorney that following its *in camera* inspection, if petitioner's objections were overruled, the records would be delivered to the grand jury over petitioner's objections (Tr. Vol. I, 95, 96). As a result, petitioner suffered eight days' confinement in May, 1975 (Tr. Vol. IV, 307).

Counsel for petitioner then sought clarification from the court and obtained agreement upon a procedure whereby petitioner would retain his right of appeal if his objections were overruled (Tr. Vol. III, 266-286).

Petitioner then delivered to the grand jury the general expense journal of the law firm,[*] which provided a complete list of all checks written on the firm's general account for the time period covered by the subpoena (Tr. Vol. IV, 314-317). The only information contained in the general journal is the person's name to whom the check was written, the date, the amount, and the account number. Nothing else. The remaining records were delivered to the District Court for its *in camera* inspection (Tr. Vol. IV, 485).

The trial court allowed petitioner to make objections before the grand jury and to supplement those objections in detail before the court *in camera*. However, the trial court refused to allow petitioner to make oral objections and required petitioner to put all additional objections to production of the records in writing (Tr. V, 495-509). After consideration of said objections and examination of the records, the trial court ordered:

> ". . . on June 27, 1975, . . . the witness . . . produce to the Grand Jury the following financial records: 1. Journal . . . 2. General Ledger Account Cards . . . (except for the four cards to which either Mr. Berry or Mr. Marchiondo have claimed the Fifth Amendment against self-incrimination). 3. Cancelled Checks with Matching Vouchers . . . 4. Checking Account Bank Statements and Deposit Slips . . . 5. Invoices and Attached Payment Vouchers . . . 6. Receipt Books . . . Excepting from the foregoing any records pertaining to pending federal criminal cases,. . .
>
> ". . . as to the four *general account cards* and five trust account cards to which either Mr. Berry or Mr. Marchiondo are claiming the privilege against

[*] Grand Jury Exhibit 841.

self-incrimination, and as to all of the remaining *trust account cards* to which Mr. Berry claims the privilege on behalf of clients, it is directed that [these claims] . . . be asserted as to specific documents before the grand jury . . . and

". . . that the *client cards* . . . remain under subpoena and in the custody of the court." Order of June 23, 1975; Appendix, p. 20a-21a. (Emphasis added.)

Petitioner appeared before the grand jury and raised specific Fifth Amendment objections, as directed, but declined to comply with the court's order insofar as it required delivery of any records to the grand jury. Thereupon he was held in contempt[10] and ordered confined without bail on the grounds that the appeal would be frivolous and taken for the purposes of delay.[11]

Thereafter, the court considered petitioner's Fifth Amendment objections, raised as to the trust account records, as stated to the grand jury, overruled same, and ordered production.[12] Petitioner declined and was again held in contempt.[13] However, as to this contempt proceeding the trial court held that petitioner could be released on his own recognizance.[14]

Upon appeal to the Tenth Circuit Court of Appeals, all orders of the District Court, including the denial of bail, were upheld.[15]

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[10] Appendix, page 22a.

[11] Appendix, page 23a.

[12] Appendix, page 30a.

[13] Appendix, page 31a.

[14] Appendix, page 32a.

[15] Appendix, page 33a-43a, 46a.

Description of Records

The subpoena served upon petitioner was not limited to a particular transaction, or a particular type of transaction, or a transaction involving a particular person or type of person, or a transaction occurring over a reasonably limited period of time. Thus the records delivered by petitioner include the financial records of three law partnerships and one professional association covering a period in excess of five years and four months (Tr. Vol. II, 194) and contain records pertaining to the work of thirteen lawyers who are no longer associated with the firm (Tr. Vol. II, 207; Vol. IV, 408). At the time of service of the subpoena, there were six lawyers employed by the professional association (Tr. Vol. IV. 395-406).

These records reflect:

(1) A complete list of all clients, including names, addresses and phone numbers;

(2) All financial transactions handled through separate trust accounts for these clients;

(3) All financial matters transacted by the firm in representation of these clients;

(4) Many private transactions of firm members;

(5) All financial transactions of the firm in the conduct of its law practice;

(6) All private financial transactions engaged in by the firm.

These records are so commingled as to make segregation of the various types of information extremely burdensome if not impossible (Tr. Vol. VI, 613-634; Vol. VIII, 755).

The subpoenaed items are contained in 34 crates which include:

—9 crates of client ledger cards (accounts receivable cards) which contain, digested and summarized by client name, all matters transacted by the firm in its representation of that client;

—11 crates of canceled checks, check copies, bank deposit slips, and bank statements drawn on both trust and general accounts;

—9 crates of invoices and payment vouchers of both general and trust accounts;

—1 crate of general ledger cards;

—1 crate of miscellaneous damaged items;

—1 crate of trust account receipt books;

—1 crate of trust account ledger cards which contain, digested and summarized by client name, all matters transacted through the separate trust accounts; and

—4 large ledger books containing the general journals of the firm, which summarize the transactions shown by all the other records (Tr. Vol. IV, 470-476).

The contents and variety of the records are just as staggering. They encompass:

—in excess of one million transactions;

—the disposition of two and one-half to three million dollars *excluding* funds handled through the clients' trust accounts;

—a list of the firm's clients during the time period involved which totals in excess of five thousand (Tr. Vol. II, 194-205, 206-213);

—notations dealing with past and *present* pending matters, including payments for psychiatric therapy, consultations about divorces, wills, adoptions, juvenile, paternity, child custody, and numerous other civil matters, as well as city, county, state and federal criminal matters which, if revealed, would result in a betrayal of the trust of the clients who have sought advice concerning these matters (Vol. I and II of the written objections submitted to the District Court).

Organization and segregation of these records required ten persons to expend more than 125 man-hours. Further sorting and examination of the records, in order to comply with the court's order to make specific objections, required expenditure of 460 additional man-hours, and caused petitioner to sustain out-of-pocket costs of $1,699.83, not to mention his inability to carry on his law practice during that period of time (Tr. Vol. V, 475; Vol. VI, 605-616, 658, 659; Vol. VIII, 753-757).

The sensitive nature of these records can only be fully comprehended by actual examination. The Court of Appeals did not have time to do this. Objections made to the grand jury are contained in the transcript of those proceedings (Tr. Vols. IV, VIII, IX). Objections specified in writing to the court are contained in two volumes designated "Objections to Production of Documents." Unfortunately, the pages of these volumes were not numbered and, therefore, specific reference is impossible. Also, being hastily thrown together in order to meet the court's time limitation, they are poorly organized. Therefore, in order to make this Court more aware of their nature, a few examples of these objections are quoted below:

> "Objections to General Categories of Cases Revealed by Client Card:

* * *

"17. Child Custody. Child custody matters are always a sensitive and personal matter to the individuals involved. Having the details of these matters revealed by the client cards is a violation of the trust that the client has placed in the law firm.

"18. Wills. The courts have held as a matter of law that the preparation of a will is entitled to protection by the attorney-client privilege. Accordingly, any of the account cards where the firm was employed for the purpose of writing the will, should not be disclosed as being within the attorney-client privilege.

* * *

"20. Juveniles. The law in most states has gone to great lengths to protect the reputation of juvenile individuals and individuals charged with violation of the juvenile code. Accordingly, all of the client cards showing that the matter is a juvenile matter should be retained as secret.

* * *

"24. Paternity suits. Paternity suits are always an embarrassing matter for the individuals involved and, in addition thereto, should be kept secret for the protection of the individual child involved. In many cases, the court files on these cases are sealed for protection of the individuals.

* * *

"[name omitted], No. 01143. All that is contained on this account card is the client's name and address [address omitted]. It is known by the attorney in this case that this individual is being sought as a witness by the United States Government. It is also known that this individual is seeking to regain entrance into the United States, and although there are no criminal charges pending against the individual, it is the individual's desire that her whereabouts remain unknown to the United States Government, and probably the address contained on this card is the only place in the United States where this information can be obtained. Accordingly, although there are no details other than the client's name and address, to be required to reveal this particular information to the United States Government at this time would very seriously violate the attorney-client privilege, require divulging of confidential communications of client, in addition to a violation of the Fourth Amendment, the right to privacy, and right to counsel.

* * *

"(20) [name omitted], No. 02150. This account card shows that the client consulted the office pertaining to financial problems and the possibility that he might take bankruptcy or obtain a divorce, or both. Also, there is a notation on the card that the bill should not be mailed to the home, evidencing that the client was very concerned about keeping the fact of his consultation secret. Accordingly, to be required to divulge this information destroys the very purpose for which the person consulted the attorney and, accordingly, to be required to deliver it violates the Fourth Amendment, the right of privacy, the due process clause, the right to counsel, divulges confidential and secret information of the client, divulges confidential communications of the client, and violates the attorney-client privilege and the attorney work product rule.

* * *

"33. Defendant's Exhibit 842-FF, Account Number 6070. Investigative Expenses. This account card

reflects various investigative expenses expended by the firm either individually or in behalf of individual clients at various times for the period indicated. It is submitted that this law firm is not only involved in various important civil matters but also various important criminal cases, and it violates the right of fundamental fairness to require the firm to divulge the amount of expenditures made for various investigative endeavors made in its own behalf and in behalf of clients. This account card would also reveal a detailed list of client names and work done for them. It would contain check numbers to which reference could be made to various other records contained in these records, which would divulge exactly the nature and manner of the investigation. Accordingly, to be required to divulge this information is not only a violation of the Fourth Amendment but a violation of the right of privacy, the due process clause, freedom of association, right to counsel, requires divulging of confidential and secret information of clients, and violates the attorney-client privilege, would require the divulging of work product of the attorney, and amounts to a taking of property without due process of law.

* * *

"49. Defendant's Exhibit 842-VV, Account Number 511, Travel Expense. These account cards reveal various expenditures made by the firm for travel expense from time to time. By review of this information and cross reference to other information contained in the records, the Grand Jury could determine all trips made by members of the firm for the period covered by the subpoena. It would also not only reveal the trips made but where they were made to, the manner of the trip, the purpose of the trip, and the client for whom the trip was made. Also, this account card reveals various client names themselves. Accordingly, to be required to reveal this information

amounts to a violation of the Fourth Amendment, the right of privacy, the due process clause, freedom of association, right to counsel, and requires the revealing of confidential and secret information of clients in violation of the attorney-client privilege, requires revealing attorney-client work product, and amounts to a taking of property without due process of law.

* * *

" OBJECTIONS TO EXHIBITS 878-LL. This is a book containing the charges journal and the cash receipts journal for the period covered by the subpoena. It contains all client names as well as information of fees charged to clients and costs charged to clients; the records contained herein would be the name of the client, the date of the charge, the purpose of the charge, the amount of the charge, the code reference to the type of charge and the balance due on the account as of the time of the entry. Cross-reference of this information with other records heretofore made will clearly show why this information is objectionable."

Petitioner's Efforts to Comply with a Reasonable Subpoena

Petitioner has offered a number of alternatives that would allow the grand jury to obtain the necessary information without infringing upon petitioner's rights. Petitioner volunteered:

(1) To go through the records himself and deliver any records relating to particular persons, entities, or transactions, and any records relating to transactions with candidates for federal office, the Attorney General of the State, or any other person reasonably specified (Tr. Vol. I, 29, 30, 43, 48, 77, 78, 126, 127; Vol. II, 210, 211; Vol. III, 260-264; Vol. IV, 294, 314;

Vol. V, 501-502; Vol. VI, 580-586; Vol. VIII, 763-764, 856);

(2) To submit all subpoenaed records to an independent audit by a C.P.A., or other person mutually agreed upon to act as a master, for examination to sort out the records that are within the scope of the grand jury investigation (Tr. Vol. II, 257, 258; Vol. V, 501, 502; Vol. VIII, 855-860);

(3) To cooperate in any other method that might be suggested to permit the grand jury to conduct its investigation without a wholesale delivery of all records covered by the subpoena (Tr. Vol. III, 260-264);

(4) To comply with a more limited subpoena as to specific records that the grand jury might be interested in. Although the grand jury stated that "There are specific pieces of evidence that the grand jury is interested in, . . ." (Tr. Vol. VIII, 763), a limited subpoena was not issued nor were the documents specified so as to allow this witness to furnish those specific items to the grand jury (Tr. Vol. II, 210-212);

(5) To provide any information and records that might relate to the government's alleged statute of limitations problem (Tr. Vol. IX, 947). At one time in these proceedings the United States Government made representations of an alleged statute of limitations problem (Tr. Vol. I, 151, 152), but this alleged "problem" was later established to be groundless, and based only upon the mere *possibility* of a statute of limitations running.[16]

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[16] See paragraph ten of "Government Response to Motion to Specify," filed June 13, 1975.

Other Evidence Material to the Issues

The Assistant United States Attorney asserted that one of the targets of the investigation is one of the principals of the law firm; however, when questioned, he declined to state whether persons known to be clients of the firm are also targets of this investigation (Tr. Vol. IV, 328).

The government has acknowledged that it will permit dissemination of information contained in these records to other governmental agencies (Tr. Vol. VIII, 857) and has not denied that the records may become public.

There was evidence offered of several specific incidents where information in the hands of the United States Attorney regarding the subject of this investigation was leaked to the news media (Tr. Vol. I, 101-107, 114-126; Vol. II, 214-221; Vol. IV, 380, 381). Although this was denied by the Assistant United States Attorney, no rebuttal evidence has ever been offered by him.

During the course of the trial court proceedings the Assistant United States Attorney admitted there had been what he classified as "consensual" electronic surveillance of petitioner and members of his firm (Tr. Vol. XII, 1072), but petitioner was not granted a hearing on the legality of such surveillance.

REASONS FOR GRANTING THE WRIT

Point I

What Necessity Must Be Shown and What Evidence of Materiality Must Be Produced to Justify Requiring a Practicing Attorney to Deliver All Financial Records of the Law Firm of Which He is a Principal to a Federal Grand Jury in Response to a Subpoena Duces Tecum When the Subpoena Has Been Challenged on the Ground That It Was Overly Broad and So Unreasonable as to Constitute an Unlawful Search and Seizure Under the Fourth Amendment? [17]

The court below held that the subpoena was not overly broad or unreasonable because the case was one "... in which there was no prior specific knowledge as to the particular documents so as to enable the demands to be with specificity. ..." [18]

Based upon the facts of this case, the rulings of the courts below, if not reversed, will have the effect of (1) permitting the grand jury to make an exploratory investigation, the purpose and limits of which can only be determined as it proceeds, (2) denying petitioner the right to demand that evidence of materiality and necessity be presented, and (3) denying petitioner the opportunity to challenge the sufficiency of any such showing in an evidentiary hearing.

Moreover, the rulings below conflict with the prior decision of the United States Supreme Court in *Hale* v. *Henkel,* 201 U.S. 43 (1906), and the decisions of the

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[17] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[18] Appendix, page 38a.

Eighth Circuit Court of Appeals in *Schwimmer* v. *United States,* 232 F.2d 855 (8th Cir. 1956), and the Seventh Circuit Court of Appeals in *Mara* v. *United States,* 454 F.2d 580 (7th Cir. 1971).

The Supreme Court has consistently recognized the rule announced in *Hale* v. *Henkel, supra,* that a grand jury subpoena duces tecum must comport with the requirements of the Fourth Amendment. *United States* v. *Calandra,* 414 U.S. 338 (1974). The ruled is expressed in *Hale* v. *Henkel, supra,* as follows:

> "... an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still ... the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum* against which the person, be he individual or corporation, is entitled to protection." 201 U.S. 43, 76.

In accord with these requirements, the Eighth Circuit Court of Appeals held in *Schwimmer* v. *United States, supra*:

> "Ordinarily ... the compelled production before a grand jury of all of one's books and papers en masse, where they constitute a substantial body, a variety of accumulation, or an extensive-period product, and the subpoena is without indication for limitation of any nature as to the class of persons, or type of transaction, or extent of period, to which the production is intended to be related, will judicially impress as not constituting a reasonable search and seizure [citations omitted]. That impression tends naturally to be cre-

> ated in such a situation, as a matter of fundamental fairness, unless it is apparent that such an en masse production is not an attempt to obtain a sea for the conducting of a general fishing expedition. . . ." 232 F.2d 855, 861.

It is submitted that under *Schwimmer, supra,* the subpoena in this case is unreasonable as a matter of law. But even assuming that the subpoena was reasonable on its face, in order to determine whether a grand jury subpoena duces tecum meets the requirements of reasonableness, the Supreme Court, in *Hale* v. *Henkel,* said:

> ". . . some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such as mass of papers." 201 U.S. 43, 77.

It is submitted that this language contemplates an evidentiary hearing wherein the government has the burden of establishing that the scope of the grand jury's subpoena is not unreasonable. *Mara* v. *United States,* 454 F.2d 580 (7th Cir. 1971), reversed on other grounds, 410 U.S. 19; *United States* v. *Dionisio,* 410 U.S. 1, 19 (1973).

At the hearing on the motion to quash the subpoena, petitioner emphatically requested an evidentiary hearing in which to challenge the sufficiency of the Assistant United States Attorney's proffer, but this request was denied (Tr. Vol. I, 26-40, 89-94).

Mara, supra, presented this issue, but this Court's reversal, on the ground that petitioner had no consti-

tutional right to challenge that subpoena, left the issue undecided; although both Justice Douglas and Justice Marshall expressed strong concern in their dissents. Accordingly, it is submitted that the Supreme Court should consider these points and articulate the quantum of proof required to support a subpoena duces tecum.

The essence of the decisions below is an elimination of all adversary element from grand jury proceedings. Adoption of such a rule can only invite abuse. As noted by Justice Marshall in his dissent in *Dionisio, supra,* quoting *Alderman* v. *United States,* 394 U.S. 165, 184 (1967):

> "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands."

This case presents a classic example of abuse of the grand jury system when one appreciates the sensitive nature and content of these records, which reveal, among other things, all financial matters, both past and present, transacted by a law firm in its representation of some five thousand clients, including the name and address of those clients. Aside from the standard question of unreasonableness, one immediately feels a repulsion generated by recognition that if the discovery sought by this subpoena is allowed, it will have a *severely chilling effect upon numerous personal rights,* long accepted as essential to the individual freedoms guaranteed by the Constitution and upon which our society is founded. Although the disclosure of

some of these records may not give rise to a technical violation of these Constitutional provisions, their disclosure nevertheless is offensive to the policies behind (1) the attorney-client privilege,[19] (2) the attorney work product,[20] (3) the Fifth Amendment[21] right against self-incrimination on the part of clients, (4) the right to privacy and freedom of association guaranteed by the First,[22] Fourth, Fifth and Ninth[23] Amendments, and (5) the public interest of encouraging individuals to seek the private and confidential advice of an attorney. In criminal cases this would have a chilling

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[19] The appropriate scope of the attorney-client privilege is governed by state law, *Baird* v. *Koerner*, 279 F.2d 623 (9th Cir. 1960). The relevant expression of attorney-client privilege is found in § 20-1-12, N.M.Stat.Ann. (1953), which provides: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment . . . concerning any facts the knowledge of which has been acquired in such capacity."

[20] *Duffy* v. *United States*, 473 F.2d 890 (8th Cir. 1973).

[21] AMENDMENT V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[22] AMENDMENT I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[23] AMENDMENT IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

effect on the Sixth Amendment right to counsel,[24] *In Re Terkeltoub*, 256 F.Supp. 683 (S.D.N.Y. 1966).

The good faith of the United States Attorney in this case is rendered questionable by reason of the rejection of numerous efforts and alternatives tendered by petitioner to allow the grand jury to proceed with its investigation of matters described in the proffer by providing records dealing with those specific persons or transactions, while at the same time avoiding mass delivery of the sensitive information. Even when the government suggested an impending statute of limitations problem, petitioner offered to produce the records relevant thereto, but all of these good faith efforts by petitioner have been rejected.

It is of interest that although the government stated that one of the principals of petitioner's law firm was a target of the investigation, any information with regard to whether other persons, known to be clients of the firm, might also be targets, was declined (Tr. Vol. IV, 328).

Assaults by criminal defendants upon the grand jury secrecy rule in order to discover evidence against them have enjoyed only slight success. But the secrecy rule does not seem to have so much vitality when it comes to dissemination of grand jury information

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[24] AMENDMENT VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

to governmental agencies. *In Re Pflaumer & Sons, Inc.,* 53 F.R.D. 464 (Pa. 1971); *Administrative Agency Access to Grand Jury Materials,* 75 Columbia Law Rev. 162. The use of information acquired by one agency for purposes unrelated to the original subpoena has not only been recognized but approved in a number of instances. *United States* v. *Culver,* 224 F.Supp. 419 (Md. 1963); *United States* v. *Hoffa,* 349 F.2d 20 (6th Cir. 1965); *United States* v. *Zirpoli,* 288 F.Supp. 993 (N.J. 1968). The Assistant United States Attorney confirmed that attitude in this case when he said:

> ". . . the United States and the appropriate federal investigators would examine these records and continue to pursue the investigation . . ." (Tr. Vol. VIII, 856, 857). (See also Tr. Vol. IV, 368.).

It was this attitude which prompted petitioner to suggest an audit by an independent master to segregate those records which would be relevant to the grand jury investigation (Tr. Vol. VIII, 855-858).

Evidence of news leaks of grand jury proceedings (Tr. Vol. I, 102-107, 114-116, 123-127; Vol. II, 214-221, 226, 227; Vol. VIII, 800-804) goes to the very creditability of the grand jury itself, and one becomes justifiably concerned about exposure of this great mass of information to a special grand jury that may indiscriminately publish portions of that information in its report to the court, which, subject to certain exceptions, becomes a public record. 18 USC § 3333.[25]

Some scholars would abolish the grand jury system because of such abuses. For the present, however, it

[25] Appendix, page 55a-57a.

lies solely within the power of this Court to provide safeguards sufficient to prevent abuses. It is submitted that retention of an adversary element in determining whether the United States Attorney has established the reasonableness of a federal grand jury subpoena duces tecum will provide at least one such safeguard.

This case presents not only a Court of Appeals decision which conflicts with prior decisions of the Supreme Court and other Courts of Appeals, but also presents an opportunity to review the rules of the grand jury system which, if clarified and strengthened, may provide a buttress against abuse of that system.

Point II

When the Financial Records of a Law Firm, Which Include Trust Accounts for the Handling of Funds of Clients by That Firm Pursuant to the Attorney-Client Relationship, Have Been Subpoenaed by a Federal Grand Jury, May That Law Firm Assert in Behalf of Said Clients the Fifth Amendment Right Against Self-Incrimination as to Those Trust Accounts?

Petitioner raised a Fifth Amendment objection to the trust account records which reflect the firm's handling of financial transactions involving clients' funds, all in the course of attorney-client relationships (Tr. Vol. VIII, 805-808). This objection was asserted in behalf of each client for which there exists a trust account (Tr. Vol. VIII, 861, 862). These records were kept and maintained by the firm, solely in accordance with obligations of the firm as attorney and custodian for its clients. The funds handled through these accounts did not belong to the law firm and were not commingled with law firm funds (Tr. Vol. VIII, 805-808). In fact, maintenance of segregated records is

required by New Mexico law[26] and the Code of Professional Responsibility.[27]

The District Court held, as to these trust accounts, that there was missing the "ingredient of personal compulsion against an accused," as described by the Supreme Court in *Couch* v. *United States,* 409 U.S. 322 (1973),[28] and, therefore, that the Fifth Amendment could not be asserted in behalf of the client. The Court of Appeals affirmed this ruling, stating "The Fifth Amendment privilege against compulsory self-incrimination is personal to the defendant or witness".[29]

To the contrary, however, the facts of this case fit within the exception to the rule announced in *Couch* and recognized in decisions of the Fifth, Eighth, and Ninth Circuit Courts of Appeals. Accordingly, the decision of the Tenth Circuit Court of Appeals directly conflicts with those of other circuits.

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[26] Article 21-2-1(3) § 13, New Mexico Statutes Annotated (1953 Comp.), provides as follows: "(a) Every attorney subject to these rules shall maintain complete records of the handling, maintenance and disposition of all funds, securities, and other properties of a client which have at any time come into his possession. These records shall cover the entire time from receipt to the time of final disposition by the said attorney of all such funds, securities and other properties. Said funds shall be maintained in a trust account and kept separate from the attorney's personal and business accounts. Said attorney shall preserve these records for a period of five years after final disposition by him of said funds, securities and other properties."

[27] Appendix, page 47a-54a.

[28] Appendix, page 27a-28a.

[29] Appendix, page 41a.

In *Schwimmer* v. *United States, supra,* where an attorney was faced with a situation similar to that of petitioner, the Eighth Circuit Court of Appeals held:

> "The attorney-client privilege is one that exists to enable a client to have subjective freedom of mind in committing his affairs to the knowledge of an attorney, whether the matter is one of consultation or of litigation . . .
>
> "The privilege thus is one that exists for the benefit of the client and not the attorney. [authorities omitted.] But the attorney has the duty upon any attempt to require him to testify or produce documents within the confidence, to make assertion of the privilege, not merely for the benefit of the client, but also as a matter of professional responsibility in preventing the policy of the law from becoming violated."

In *United States* v. *Kazmir,* 499 F.2d 444 (5th Cir. 1974), the Fifth Circuit recognized that the ABA Code of Professional Responsibility, Ethical Consideration 4-4,[30] requires an attorney to safeguard the confidence and secrets of his clients beyond any evidentiary privilege. The court in this regard stated:

> ". . . While the accountant has a legal duty to disclose, the attorney has a strict, ethical obligation to prevent disclosure. This ethical obligation is broader than, and independent of, the attorney-client privilege . . ."

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[30] The ABA Code of Professional Responsibility, Ethical Consideration 4-4, provides, in part: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information *or the fact that others share the knowledge.*"

The Ninth Circuit Court of Appeals, in *United States* v. *Judson,* 322 F.2d 460, 467 (9th Cir. 1963), held:

> ". . . The attorney and his client are so identical with respect to the function of the evidence and the proceedings which call for its production that any distinction is mere sophistry."

There is present in this case both the aspect of ownership, which gives a client an expectation of privacy, and possession by the law firm, which confers standing to assert this privilege.

The District Court's assertion that these records are on forms provided by the firm and are, therefore, owned by the firm is not controlling, for in *Couch, supra,* the Supreme Court held that ownership is not the controlling factor. In *United States* v. *Kazmir, supra,* 499 F.2d at 450, quoting *Couch, supra,* the Court said: "To tie the privilege . . . to a concept of ownership would be to draw a meaningless line."

There exists in this case a distinction from the facts in *Judson, supra,* and *Kazmir, supra,* in that in those cases a particular client was the target of the investigation. Here, the United States Attorney refused to disclose if he was concerned about any particular client (Tr. Vol. IV, 328), and simply sought mass discovery of the records pertaining to all clients.[31] Because of this factor, it may be that the Fourth Amendment rather than the Fifth Amendment is controlling, but should the Fourth Amendment not control, then the issue is here presented on all fours with the cases above cited.

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[31] There were in excess of 1,000 trust accounts included in the records subpoenaed. (Tr. Vol. VIII, 860-863.)

The government's reliance below on *Bellis* v. *United States,* 417 U.S. 85 (1974), is misplaced. In *Bellis* the attorney asserted a Fifth Amendment objection in behalf of himself, not in behalf of clients, as to *client trust accounts.*

For the foregoing reasons the Supreme Court should review the issues in this case with regard to the right of petitioner's to assert a Fifth Amendment privilege in behalf of clients of his firm as to the clients' trust account records.

Point III

Does the Thirty-Day Limitation Provision of 28 USC § 1826(b) Deprive Appellant of the Right to Appeal, Where Such Time Limitation Does Not Permit Inspection of Exhibits and the Appellate Court Could Do No More Than Hurriedly Review the Transcript and the Complex Briefs?

The Tenth Circuit held that the thirty-day requirement of 28 USC § 1826(b)[32] was mandatory and could not be waived as contended by petitioner.[33] Consequently, that court was unable to review the records and could "do no more than hurriedly review the transcript and the complex briefs".[34] This explains why the Tenth Circuit's opinion does not address several of the issues raised by petitioner in that court. Moreover, that opinion is fraught with, and based upon, nu-

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[32] Appendix, page 58a.

[33] In the conclusion of his brief in the Court of Appeals, and at oral argument, petitioner advised he would be willing to waive the thirty-day limitation to permit that court to have ample time to consider all the issues.

[34] Appellant's request that the court order briefs to be filed on July 25, 1975, to allow a full week for consideration, was denied.

merous factual errors.[35] For example, and most significantly, that court concluded that petitioner had waived his Fourth Amendment claim because he had "produced all of his records in accordance with the subpoena . . . [and] had fulfilled the requirements of the subpoena . . ."[36] The fact is, however, that the records were merely delivered to the District Court for *in camera* inspection and were by no means "produced . . . in accordance with the subpoena" (Tr. Vol. IV, 485). The Circuit Court also held that the grand jury had "no prior specific knowledge" as would permit specificity, but that holding ignores an admission by the Assistant United States Attorney that there were some items that could be specified (Tr. Vol. VIII, 761-763).

These circumstances raise the question of whether the thirty-day time limitation of 28 U.S.C. 1826(b)[37] denied petitioner his constitutional and statutory right to appeal. This is not the first case in which a court of appeals has found itself unable to render a full and complete review because of the thirty-day time limitation. See *Charleston* v. *United States,* 444 F.2d 504 (9th Cir.), certiorari dismissed, 404 U.S. 916 (1971). Clearly petitioner has a statutory right to appeal. Also, the due process clause of the Fifth Amend-

[35] The government called one of the minor errors to the court's attention by letter to the Clerk dated August 4, 1975.

[36] Appendix, page 36a.

[37] Appendix, page 58a.

ment mandates that a judgment of confinement be subject to appeal. This Court has never had to rule on the constitutionality of the right to appeal, because all fifty states and the federal system provide for statutory appeal. *Griffin* v. *Illinois,* 351 U.S. 12, 18 (1956). But the right to appeal encompasses the right to have the issues fully presented and fully considered. But where, as here, the appellate court affirms a lower court ruling and states in their opinion that they have not been able to review the record, or even the transcript of the briefs, except "hurriedly," and have only had two days in which to issue an opinion in a complicated case, then, we submit the right to appeal has been denied.

It is respectfully submitted that this case presents important federal questions which have not been, but should be, settled by this Court and that the decisions below have so far departed from accepted judicial proceedings as to call for an exercise of this Court's power of supervision to Rule 19(b).[38]

[38] The applicable portions of Rule 19, Supreme Court Rules, provide: ". . . The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: . . . Where a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this Court; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision. . . ."

CONCLUSION

For these reasons a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Subpoena to Testify Before Grand Jury

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MISC. NO. 6312

To CHARLES G. BERRY
MARCHIONDO & BERRY, P.A.
315 5th, N.W.
Albuquerque, New Mexico

You are hereby commanded to appear in the United States District Court for the District of New Mexico at Federal Bldg., 500 Gold, S.W., 11th Floor Grand Jury Room, U. S. Courthouse & in the city of Albuquerque on the 25th day of April 1975 at 9:00 o'clock A.M. to testify before the Grand Jury and bring with you (see attachment to this subpoena)

This subpoena is issued on application of the United States

Richard S. Shine, Asst. U.S. Attorney 766-3341

L. G. KANALY, *Clerk*

Date April 21, 1975 By /s/ Illegible *Deputy Clerk*

BRING WITH YOU: for the period from January 1, 1970 to the date of this subpoena, any and all financial records of any type or description which relate, either directly or indirectly, to the financial affairs of Marchiondo & Berry, P.A., any of its predecessor or successor entities or organizations and any entities or organizations which are, either directly or indirectly, affiliated or related to said Professional Association, its predecessor or successor entities or organizations, which records should include but not be limited to any and all books, ledgers, journals or records of any type relating to income and expenses from professional fees, legal fees or any other type of income: any and all bank statements, cancelled checks, deposit slips or passbooks re-

lating to any checking or savings accounts of said organizations or entities; and any and all records or correspondence of any type, not covered by the attorney-client privilege, with any person or entity relating either directly or indirectly to any of the above records, documents and objects.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

IN RE: GRAND JURY SUBPOENA MISC. NO. 6312

Motion

COMES NOW CHARLES G. BERRY and respectfully moves the Court for an order quashing the subpoena which was served upon the movant, a copy of said subpoena being attached hereto and to which reference is hereby made.

That grounds for requesting that this subpoena be quashed are that the said subpoena is too broad, general, and vague in its terms, is unduly oppressive, and it is impossible for movant to comply with said subpoena. Further, the time for the appearance is April 25, 1975 and it is impossible to accumulate all of said information by said date.

Further, movant asserts in behalf of himself and as an officer and director of Marchiondo & Berry, P.A., and in behalf of Marchiondo & Berry, P.A., that said subpoena, by its terms, is a violation of the Fourth Amendment rights provided to Marchiondo & Berry, P.A. by the United States Constitution and accordingly should be suppressed.

Movant further requests that the Court sequester and seal all proceedings upon this motion upon the grounds that on prior occasions when members of movant's law firm were subpoenaed to testify before a Federal Grand Jury, derogatory news articles have appeared inferring that movant and movant's firm have engaged in unlawful activity as a result of a fire which recently occurred on movant's premises.

Movant further requests that movant be afforded a full and complete evidentiary hearing upon this matter.

CHARLES G. BERRY

Memo Regarding Memorandum Opinions of the United States District Court for the District of New Mexico, Dated June 23, 1975 and July 2, 1975.

The memorandum opinions of the District Court specified names and transactions which were disclosed by Petitioner to the court in ex parte *in camera* proceeding with the understanding that these revelations would not be disclosed to the United States Attorney. Accordingly, only an expurgated copy of this memorandum opinion was delivered to the United States Attorney. In order to continue this confidentiality the copy of the memorandum opinion included in the Appendix is the expurgated copy; however, the original memorandum opinion was included in the record transmitted to the Tenth Circuit Court of Appeals and will be furnished to designated court personnel upon request.

(Caption Omitted in Printing)

Memorandum Opinion

(Filed June 23, 1975)

This matter comes on for consideration of the Government's motion for *in camera* inspection of certain financial records of the law firm of Marchiondo & Berry, P.A., and its predecessors. The witness, Charles G. Berry, is custodian of these records, an attorney in the firm, and one of the principal shareholders of the professional association. Pursuant to subpoena and order of this court the records were produced to the grand jury on May 19, 1975. Before the grand jury privileges were claimed as to each of the various types of financial records, with one exception as to the check journal which is now in the possession of the grand jury. All of the other records were transferred to the custody of the court pursuant to this motion to rule on the validity of the claimed privileges.

In addition to the claims of privilege to general types of financial records asserted before the grand jury, Mr. Berry desired to assert and detail to the court, *ex parte,* specific claims of privileges as to a number of individual documents found among the financial records. Accordingly, beginning May 21, 1975, Mr. Berry, his attorneys, past and present legal associates, and any secretarial help of their choosing have had 24 hours a day seven days a week access to the records in order to detail their specific objections. These objections were to be tendered by June 9, 1975. An *ex parte* hearing was held the afternoon of June 9th at which Mr. Berry's attorneys were given the opportunity to present further evidence in support of any of the claims of privilege.

Upon the evidence submitted at that hearing, the proceedings before the grand jury, the statements of counsel, the financial records under subpoena, and the briefs filed herein, the following are the findings of fact and conclusions of law.

I.

A brief inventory and description of the financial records is as follows:

1. Journals

   (a) GJ Ex 841 Check journal for 1-70 to 3-75. This was turned over to the grand jury.

   (b) GJ Ex 876 General journal entries for Marchiondo & Berry, P.A., 8-1-72 to 3-31-75. Names of clients are sometimes revealed.

   (c) GJ Ex 877 Trust accounts journal for 1-1-70 to 3-31-75. Shows receipts and disbursements of trusts and reveals client's name and name of person from whom check received or to whom check disbursed.

   (d) GJ Ex 878 Charges and cash receipts journal for 1-1-70 to 4-11-75. Shows name of a client, the date of the charge, purpose for the charge, amount, code reference to the type of charge, and the balance due on the account as of the time of the entry.

2. Ledger Account Cards

   (a) GJ Ex 842 General ledger cards. Show very sketchy description of any receipts and disbursements in that account, date of entry, amount of charge or credit, and balance.

   (b) GJ Ex. 860 Trust ledger cards. Show very sketchy description of any receipts and disbursements in that trust account, date of entry, amount of charge or credit, and balance.

3. Cancelled Checks With Matching Voucher

   (a) Checks on law firm account with matching voucher. The voucher is merely a carbon copy of the check and check stub. The only additional information on the stub may be a brief description of the purpose for the check and the account number to which it is to be charged, if any.
   GJ Ex. 865, 866, 867, 868, 869, 873

   (b) Checks drawn on trust account with matching voucher.
   GJ Ex. 864, 874

4. Checking Account Bank Statements and Deposit Slips

   (a) Law Firm Accounts
   Monthly statement of debits and credits and ending balance on checking account.
   GJ Ex. 871, 872

   (b) Trust Accounts
   GJ Ex. 870

5. Invoices and Attached Payment Voucher

   These are copies of billings made to the law firm for expenses of the firm. Attached to the bill is a payment voucher. This is merely an additional carbon copy of the check and stub sent to the payee in payment of the bill.
   GJ Ex. 848, 849, 850, 854, 855, 856, 857, 858, 859.

6. Receipt Books

   Shows carbon copy of receipt given to payor for receipt of money. Reflects name of payor, date, amount, and brief explanation for payment.

   (a) Trust receipts book GJ Ex. 862.

   (b) General account receipts book GJ Ex. 863.

7. Client Cards

Shows the name, address, and telephone number of client, the type of case, attorney assigned to the matter, and a very brief description of the nature of work billed and the amount and date of each billing. In a few instances a brief reference is made to a conference with a client or specific work done on behalf of a client.
GJ Ex. 843, 844, 845, 846, 847, 851, 852, 853, 875.

8. Miscellaneous GJ Ex. 861

Contains approximately 20 client cards, two client files, and some unidentified papers.

In addition to the foregoing financial records, during *in camera* proceedings Mr. Berry's attorney represented that records as to the firm's pension or retirement plan exist but were not produced because they were thought to be outside the scope of the subpoena. However, a general ledger card was found for at least one year of the firm's pension plan, acct. no. 6004. If additional financial records concerning the firm's pension or retirement plans exist and are not found among the records produced, the court does not at this time intimate any view as to whether such records are within the scope of the subpoena.

II.

Before turning to the specific claims of privileges some general observations are helpful if made at this point.

Mr. Berry has repeatedly continued to raise the Fourth Amendment claim that the subpoena is overbroad and oppressive. The court has already ruled on this claim and the matter is on appeal. Mr. Berry, however, has not let the matter remain in that posture. Rather, he has spent considerable effort building a record as to why it is oppressive and thus contrary to the Fourth Amendment to compel him to produce the records to the grand jury. He has attempted to do this in two ways. First, he has asserted a host of privileges as to the various financial records a substantial portion of which are so patently frivolous that they cannot be

claimed in good faith. He has specified these meritless privileges to a few example documents and then declared that it is too expensive and time consuming to specify as to all the documents, thus concluding that the subpoena is oppressive.

The short answer to Mr. Berry's objection is that he should assert only those privileges he can raise in good faith. Notwithstanding the statute of limitations problem, the court gave Mr. Berry 19 days in which to make specific claims of privileges as to certain documents. Never during that period was the court informed that that was an insufficient length of time. The greater portion of what was produced to the court on June 9th was a reiteration of the privileges claimed in general before the grand jury, additional reasons why the subpoena was oppressive, and a list compiled by Kelly Girls of all client cards broken down by attorney and type of case. These lists represent considerable effort by the Kelly Girls but they are of only marginal usefulness in specifying privileges claimed as to certain documents.

The second way in which Mr. Berry has sought to build a record that the subpoena is oppressive is by attempting to show that the records are so interrelated that to produce even the most clearly non-privileged documents is to violate privileges as to others. Accordingly, he argues he need not produce any. Thus, for example, he refuses to produce cancelled checks because these relate to disbursements made on behalf of a client and are reflected on a client card. In the same manner Mr. Berry refused to produce bank statements and deposit slips. Copies of all these documents are kept with the bank's business records, and any claim that they are privileged is meritless.

Rather than produce many of the records and claim privileges in good faith as to the remaining, Mr. Berry has repeatedly maintained that the grand jury should have to request the records of specific clients or as to specific transactions. To adopt such a narrow view of the grand jury's investigative powers is to so hobble them that it is unlikely

they can successfully carry out their duties. The Government's proffer in regard to matters the grand jury is investigating includes the "laundering" of funds to cover up illegal campaign financing. The ease with which that can be accomplished and why all the firm's accounts need to be examined was demonstrated by an incident described by Mr. Berry himself.

If this can be done without even the firm's bookkeeper knowing about it, it is all too apparent that the grand jury cannot possibly specify what documents they are wanting to examine without looking at all of the law firm's financial records.

In light of the above findings it is with great regret that the court must conclude that Mr. Berry has not proceeded in good faith in stating privileges he claims as to specific documents and has only sought to delay the proceedings of the grand jury.

III.

The court has decided to order Mr. Berry to produce to the grand jury all of the financial records in the custody of the court except for the client cards and a few other minor exceptions.

The client cards will not be ordered produced at this time because a few of them do arguably contain confidential attorney-client communications. It is also anticipated that the grand jury would find few if any of the over 5000 cards of any interest. The client cards remain under subpoena and in the custody of the court. If the other records lead the grand jury to request to look at some or all of the client cards, then the court will rule on any of the claimed privileges pertaining to the cards they request produced. Accordingly, the discussion here will pertain only to privileges claimed as to records other than the client cards. The court is cognizant of Mr. Berry's argument that the other financial records are related to matters found on the client cards and together the cards and other records

reveal confidences of the client. However, not until such time as the grand jury requests production of any client cards will these claims of privilege have to be passed upon by the court.

The court will also not order produced any financial records which pertain to pending federal criminal cases where an indictment or information has been filed. Expenses incurred on behalf of the defense of a criminal client are not properly discoverable by the Government. Approximately 25 such cases have been noted by lawyers in the law firm. Upon request, the attorneys in Mr. Berry's firm along with their bookkeeper will be given sufficient time and access to the records to pull this information and present it to the court.

As to the following ledger account cards, Mr. Berry or Mr. Marchiondo have asserted to the court, *ex parte*, the Fifth Amendment privilege against self-incrimination on behalf of themselves individually or on behalf of a client.

General Acct. No. 1033, Loans to Stockholders—WCM, Found in GJ Ex. 842. Fifth Amendment claimed by Mr. Marchiondo and individual stockholders.

General Acct. No. 1032, Loans to Stockholders—CGB Found in GJ Ex. 842. Fifth Amendment claimed by Mr. Berry.

General Acct. No. 203, Acct. Payable to WCM—
Found in GJ Ex. 842. Fifth Amendment claimed by Mr. Marchiondo.

General Acct. No. 307, Drawing Account Charles G. Berry 1972, Found in GJ Ex. 842. Fifth Amendment claimed by Mr. Berry.

"Trust Account—William C. Marchiondo Trustee," Found in GJ Ex. 860. Fifth Amendment claimed by Mr. Marchiondo.

Trust Account, "Marchiondo, William C., Trustee ," Found in GJ Ex. 860. Fifth Amendment claimed by Mr. Marchiondo.

Trust Account, "William C. Marchiondo— ," Found in GJ Ex. 860. Fifth Amendment claimed by Mr. Marchiondo.

Trust Account, ," Found in GJ Ex. 860. Fifth Amendment claimed by Mr. Marchiondo.

Trust Account, ," Found in GJ Ex. 860. Fifth Amendment claimed by Mr. Marchiondo.

As to all of the remaining trust account cards found in GJ Ex. 860 Mr. Berry asserts the Ffith Amendment on behalf of the client concerned until the same has been waived by each individual client.

These account ledger cards will not be ordered produced at this time. Any Fifth Amendment claim will have to be asserted before the grand jury as to each specific card. Then, upon motion of the Government acting at the direction of the grand jury, the court will examine these records *in camera* and rule upon the Fifth Amendment claims.

Finally, the trust account ledger card for will not be ordered produced at this time. The first four entries on this account card show payments by individuals other than . Mr. Berry claims that the client and the persons making the payments instructed that the identity of those making the payments was to remain secret. The court will rule on this claim of privilege at a later time.

Below is a list of the financial records that the court is ordering produced at this time (subject to removal of matters pertaining to pending criminal cases) and Mr. Berry's claims of privilege thereto. Blanket claims of privilege or violations of constitutional rights asserted as to all the records are as follows: right to be free of unreasonable search and seizure, freedom of association, right to privacy, right to assistance of counsel, attorney-client privilege, right not to reveal attorney work product, right to not have property taken without just compensation and due process of law.

1. Journals

   GJ Ex. 876 General journal entries for Marchiondo & Berry, P.A., 8-1-72 to 3-31-75.

   GJ Ex. 877 Trust accounts journal for 1-1-70 to 3-31-75.

   GJ Ex. 878 Charges and cash receipts journal for 1-1-70 to 4-11-75.

   Claimed Privileges: Confidential information; reveals client names and receipts and disbursements on behalf

of clients; journals can be used to cross-reference to information in the other financial records.

2. General Ledger Account Cards, GJ Ex. 842 (except for the four cards to which either Mr. Berry or Mr. Marchiondo have claimed the Fifth Amendment).

   Claimed Privileges: cards can be used to cross-reference to information in the other financial records; attorney-client privilege as to client names and transactions with clients; confidential information as to the existence of law firm checking accounts; right of privacy; freedom of association; freedom of contract; that certain of the records are irrelevant and immaterial to the grand jury investigation; violates Fourth Amendment right to be free of unreasonable search and seizure; constitutes the taking of property without due process; embarrassing to members of the firm and others; denies or interfers with right to counsel; violates the attorney work-product rule; violates both attorney-client privilege and duty of attorney to not reveal secrets of his clients.

3. Cancelled Checks with Matching Vouchers

   GJ Ex. 864, 865, 866, 867, 868, 869, 873, 874.

   Claimed Privileges: checks and voucher can be used to cross-reference to information in the other financial records; attorney-client privilege and secrets; confidential information.

4. Checking Account Bank Statements and Deposit Slips

   GJ Ex. 870, 871, 872.

   Claimed Privileges: statements and slips can be used to cross-reference to information in the other financial records; attorney-client privilege; confidential information.

5. Invoices and Attached Payment Voucher

   GJ Ex. 848, 849, 850, 854, 855, 856, 857, 858, 859.

   Claimed Privileges: invoice and voucher can be used to cross-reference to information in the other financial records; attorney-client privilege and secrets; attorney work product; Fourth Amendment; right of privacy; due process clause; freedom of association; right to

counsel; taking of property without due process of law; irrelevant and immaterial to grand jury investigation; confidential information; embarrassing.

6. Receipt Books

GJ Ex. 862, 863

Claimed Privileges: receipts can be used to cross-reference to information in the other financial records; attorney-client privilege and secrets; confidential information on transactions with clients and others.

Before turning to specific claims of privilege some general observations are appropriate. First, the scope of the grand jury's power to compel testimony and the production of documents is necessarily broad if it is to successfully carry out its duty to investigate possible criminal activity.

> The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia,* 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone,* 429 F.2d 138, 140 (CA2 1970). Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. *Costello* v. *United States,* 350 U.S., at 362.

Branzburg v. *Hayes,* 408 U.S. 665, 701 (1972).

> The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as "so necessary to the administration of justice" that the witness' personal interest in privacy must yield to the public's overriding interest in

> full disclosure. *Blair* v. *United States,* 250 U.S., at 281. Furthermore a witness may not interfere with the course of the grand jury's inquiry. He "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his." Id., at 282. Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." *Ibid.*

United States v. *Calandra,* 414 U.S. 338, 345 (1974).

Second, if the powers of the grand jury to compel testimony and the production of documents is very broad, necessarily any claims of privilege or right to privacy on behalf of witnesses must be drawn very narrowly. If this was not the case evidence of criminal activity could often be successfully concealed under the guise of privileged information.

> For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive rule . . .
>
> (1) From the point of view of the *duty* here predicated, it emphasizes the sacrifice which is due from every member of the community. That sacrifice may take two forms, either of them serious enough:
>
> In the first place, it may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. . . .
>
> . . . Or the sacrifice may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. . . .
>
> (2) From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an

institution and from law and order as indispensable elements of civilized life. . . .

(3) It follows on the one hand, that *all privileges of exemption from this duty are exceptional,* and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

8 Wigmore, Evidence § 2192 (McNaughton rev. 1961).

With these general principles in mind each of the privileges Mr. Berry asserts will be discussed.

Irrelevant & Immaterial

It is alleged that some of the records under subpoena cannot possibly be relevant or material to any matters that the grand jury is investigating. However, a grand jury witness is not permitted to raise such an objection. A witness "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise [at trial], for this is no concern of his." *Blair* v. *United States,* 250 U.S. 273, 282 (1919). Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." *Id. See United States* v. *Calandra,* 414 U.S. 338, 345 (1974).

Attorney Client Privilege & Secrets

Mr. Berry concedes in his brief, as he must, that "[t]he general rule is that the identity of a client and the amount

of fee paid by a client does not fall within the attorney-client privilege." Annot. Disclosure of Name, Identity, Address, Occupation, or Business of Client As Violation of Attorney-Client Privilege, 16 A.L.R.3d. 1047 (1967). However, it is argued that by subpoenaing a complete list of clients of the law firm along with fees paid somehow the privilege springs into existence. A few narrow exceptions to the general rule are cited but no showing is made that any of the records under subpoena come within those exceptions.

The attorney-client privilege extends only to substantive matters communicated to one's attorney in professional confidence. The law in this circuit is amply clear that the financial records of an attorney concerning transactions with a client are not privileged. In *United States* v. *Hodgson,* 492 F.2d 1175 (10th Cir. 1974), a summons was served on an attorney requesting all records dealing with charges or credits to or on behalf of a certain client for legal services over a six year period. "The requested records included amounts, payment dates, names of those making payment or causing credit to be made, and the manner in which payments or credits were made." *Id.* at 1176. The lawyer's claim was identical to Mr. Berry's, i.e., that the records would disclose the general nature of the legal services rendered the client and thus are protected by the attorney-client privilege. The claim of privilege was denied.

In *S.E.C.* v. *First Security Bank of Utah,* 447 F.2d 166 (10th Cir. 1971), two lawyers intervened in an attempt by the SEC to subpoena records of the attorneys' trust accounts from a commercial bank. The records sought were account statements, deposit slips, items deposited, and checks drawn on the trust account. Rejecting any claim that the records were protected by the attorney-client privilege, the court said that

> [t]he deposit and disbursement of money in a commercial checking account are not confidential communications. The records are the property of the bank and are made by it for its business purposes. . . .

> . . . A client may not immunize his business transactions from discovery by the device of a lawyer's commercial checking account.

Id. at 167.

The Court of Appeals for the Fifth Circuit rejected a claim of attorney-client privilege asserted by an attorney when served with a summons to produce financial records consisting of cancelled checks, bank statements, duplicate deposit slips and general ledger and cash receipts and disbursements journals. *United States* v. *Ponder,* 475 F.2d 37 (1973). *See also, In Re Michaelson,* 511 F.2d 882 (9th Cir. 1975).

Mr. Berry also asserts a privilege against revealing client "secrets" as distinguished from client "confidences." Definitions of these terms are found in ABA Disciplinary Rule 4-101(A):

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

As Ethical Consideration 4-4 points out, "secrets" of one's clients fall outside the evidentiary privilege. Thus, an attorney can be compelled to reveal client "secrets" without violating any recognized privilege. *See* ABA DR 4-101(C)(2). This is not to say that the law firm's records reveal any client "secrets,' but if they did such would not be privileged.

Freedom of Association

It is alleged that being compelled to produce the financial records violates the First Amendment freedom of association. It is said that this is done, in part, by revealing people who attorneys in the firm have entertained, had meetings with, or sent gifts or contributions to. This is a

totally frivolous objection. *See In Re Michaelson,* 511 F.2d 882, 892 (9th Cir. 1975).

Right to Effective Counsel

It is asserted that to cause the law firm to produce all of its financial records since 1970 will inhibit or chill possible future clients from seeking to retain the firm in criminal matters. This is highly speculative, and it is doubtful that the law firm has standing to raise this objection on behalf of others. Nevertheless, any claim that exposing the financial arrangements with a past client violates any Sixth Amendment right to counsel as to those past clients or any future clients is simply without merit. *See In Re Michaelson, supra,* at 892. It should be remembered that the court is permitting the culling of all financial records pertaining to all pending criminal cases and not ordering their production.

Freedom of Contract

The witness maintains that the freedom to contract of clients and attorneys in his firm is inhibited by the subpoena. This too is a frivolous objection. To the extent that the argument is that the contractual arrangement between the attorney and client is "chilled," this is much like the right to effective counsel objection. Any argument that possible clients will not seek the law firm for assistance in future contractual legal matters is highly speculative. Finally, if the argument is that clients do not want information concerning past contracts or loans they entered into with the firm or others that might be reflected in the firm's records placed in the hands of the grand jury, Mr. Berry is really raising the attorney-client privilege and "secrets" objection again.

Attorney Work Product Rule

It is maintained that the financial records of the law firm would reveal investigative activity and other case preparation on behalf of clients that falls within the attorney work product rule. There appears to be a conflict of opinion as to

whether the work product privilege is applicable to grand jury investigations. *Compare, Duffy* v. *United States,* 473 F.2d 840 (8th Cir. 1973), with *United States* v. *McKay,* 372 F.2d 174, 176 (5th Cir. 1967). Assuming, *arguendo,* that the rule does apply to grand jury proceedings, the privilege clearly does not protect any of the financial records under subpoena here. *Colton* v. *United States,* 306 F.2d 633, 639-40 (2nd Cir. 1962), *cert. denied,* 371 U.S. 951 (1963). The work product rule applies only to documents or other matters that were prepared in anticipation of litigation or for trial. Wright & Miller, *Federal Practice and Procedure: Civil* § 2024 (1970). All of the matters ordered produced herein are financial records of the law firm prepared for the use and benefit of the firm and were never intended for or been used by or on behalf of a client in preparation of litigation.

Taking of Property Without Just Compensation or Due Process of Law

This is yet another meritless objection. Mr. Berry is receiving the process which he is due. He is not being permanently deprived of his records; they will be returned by the grand jury after they have had an opportunity to adequately examine them. As to any additional expense or inconvenience that has been caused Mr. Berry in order to comply with the subpoena, this has already been responded to in the above quoted section from 8 Wigmore, Evidence § 2192 (McNaughten rev. 1961), that if the public has a right to every man's evidence this will necessarily result in some sacrifice of time, labor, and money for those called on to testify.

Right to Privacy

The right of privacy in the context of grand jury proceedings is no broader than the Fourth Amendment proscription against unreasonable and oppressive subpoenas.

> The grand jury is . . . without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena *duces tecum* will be disallowed if it is "far too sweeping in its terms to be regarded as reasonable" under the Fourth Amendment. *Hale* v. *Henkel,* 201 U.S. 43, 76 (1906).

United States v. *Calandra,* 414 U.S. 338, 346 (1974). The right of privacy is never absolute. All that the Fourth Amendment requires is that if the grand jury is to invade by way of a subpoena *duces tecum* any person or entity's expectation of privacy, that invasion must be reasonable and not oppressive. Based upon the proffer tendered by the Government as to matters being investigated by the grand jury and evidence already in their possession, this court has already ruled on the Fourth Amendment question and the matter is on appeal. *Cf. In Re Michaelson,* 511 F.2d 882, 891 (9th Cir. 1975).

V.

An order will be filed in accordance with the views expressed herein. That order, but not this opinion, shall be served upon the United States Attorney.

/s/ Howard Bratton
United States District Judge

(Caption Omitted in Printing)

Order

(Filed June 23, 1975)

This matter coming on for consideration of the Government's motion for *in camera* inspection of certain financial records of the law firm of Marchiondo & Berry, P.A., and its predecessors, and the court having filed its findings of fact and conclusions of law in a memorandum opinion herein; Now, Therefore;

It Is By The Court Ordered that on June 27, 1975, at 9:30 a.m., the witness, Charles G. Berry, produce to the grand jury the following financial records:

1. Journals
   GJ Ex. 876-JJ, 877-KK, 878-LL.
2. General Ledger Account Cards
   GJ Ex. 842-B (except for the four cards to which either Mr. Berry or Mr. Marchiondo have claimed the Fifth Amendment against self-incrimination).
3. Cancelled Checks with Matching Vouchers
   GJ Ex. 864-X, 865-Y, 866-Z, 867-AA, 868-BB, 869-CC, 873-GG, 874-HH.
4. Checking Account Bank Statements and Deposit Slips
   GJ Ex. 870-DD, 871-EE, 872-FF.
5. Invoices and Attached Payment Vouchers
   GJ Ex. 848-H, 849-I, 850-J, 854-N, 855-O, 856-P, 857-Q, 858-R, 859-S.
6. Receipt Books
   GJ Ex. 862-V, 863-W.

Excepting from the foregoing any records pertaining to pending federal criminal cases, and it is ordered that between the filing of this order and June 27, 1975, the witness, members of his law firm, and his bookkeeper shall have access to all of the records to remove or excise therefrom all such financial records and present them to the court; and

It Is Further Ordered By The Court that as to the four general account cards and five trust account cards to which either Mr. Berry or Mr. Marchiondo are claiming the privilege against self-incrimination, and as to all of the remaining trust account cards to which Mr. Berry claims the privilege on behalf of clients, it is directed that any Fifth Amendment claims against self-incrimination shall be asserted as to specific documents before the grand jury on June 27, 1975, at 9:30 a.m., and in the event any such privilege is claimed, upon motion of the Government the court will inspect these documents *in camera* and rule on the asserted privilege; and,

It Is Further Ordered By The Court that the client cards, GJ Ex. 843-C, 844-D, 845-E, 846-F, 847-G, 851-K, 852-L 853-M, 875-II, and the box marked Miscellaneous, Damaged in Fire, and Unidentified, GJ Ex. 861-U, all remain under subpoena and in the custody of the court.

/s/ Howard Bratton
United States District Judge

(Caption Omitted in Printing)

Order

(Filed July 2, 1975)

The Motion of the United States Attorney on behalf of the Federal Grand Jury to order the confinement of witness Charles G. Berry pursuant to 28 U.S.C. § 1826(a) having come on for hearing, and it appearing that the witness Charles G. Berry has willfully and without just cause refused to obey the Court's Order of June 23, 1975, to produce before the Grand Jury on June 27, 1975, the records that were ruled upon and ordered produced before the grand jury on that date, and it further appearing that the witness and his counsel have been given adequate notice and a fair opportunity to defend in this hearing, Now, Therefore,

IT IS ORDERED that the witness Charles G. Berry be, and he hereby is, ADJUDGED in civil contempt of the Court.

IT IS THE FURTHER ORDER OF THE COURT that Charles G. Berry is hereby remanded to the custody of the United States Marshal to be forthwith placed in confinement until such time as the witness is willing to obey the Order of the Court entered on June 23, 1975, to produce before the Grand Jury the records ordered produced therein, or until the expiration of the term of the Federal Grand Jury including extensions, before which such refusal to comply with the Order of the Court occurred, whichever comes first; provided that in no event shall such confinement exceed eighteen (18) months.

/s/ HOWARD BRATTON
United States District Judge

(Caption Omitted in Printing)

Order

(Filed July 2, 1975)

This matter coming on for consideration upon the Motion of Charles G. Berry for release on bail pending appeal in this cause, and it having been concluded and announced in open court that the appeal is frivolous and is for the purpose of delay; Now, Therefore,

IT IS THE ORDER OF THE COURT that the Motion of Charles G. Berry for release on bail pending appeal of the ruling in Cause No. 75-352 Civil be, and it hereby is, denied.

IT IS THE FURTHER ORDER OF THE COURT that Charles G. Berry surrender himself to the United States Marshal in Albuquerque, New Mexico, before 4:00 P.M., Thursday, July 3, 1975.

/s/ HOWARD BRATTON
United States District Judge

(Caption Omitted in Printing)

Memorandum Opinion

(Filed July 2, 1975)

This matter comes on for consideration of the Government's oral motion to inspect *in camera* certain ledger account cards of the law firm of Marchiondo & Berry, P.A., and its predecessors, and to rule upon the question whether the Fifth Amendment privilege against self-incrimination can be asserted thereto.

Pursuant to subpoena and order of this court the financial records of the law firm were produced to the grand jury on May 19, 1975. Before the grand jury privileges were claimed as to each of the various types of financial records, however, no Fifth Amendment claim against self-incrimination was asserted as to any of the records. On June 9, 1975, during an *ex parte* hearing Mr. Berry first raised the Fifth Amendment claim in regard to certain general account and trust account cards. It was believed that any privilege against self-incrimination would have to be asserted before the grand jury. Accordingly, on June 23, 1975, this court filed an order directing that Mr. Berry raise any Fifth Amendment claims against self-incrimination that he desired to assert before the grand jury. This was done on June 27, 1975, and the Government now moves that the asserted privilege be denied.

I.

As to the following ledger account cards Mr. Berry has asserted to the grand jury the Fifth Amendment privilege against self-incrimination on behalf of himself, Mr. Marchiondo, other lawyers in the law firm, or on behalf of a client.

General Acct. No. 1033, "

General Acct. No. 1032, "Loans To Stockholders—CGB," GJ Ex. 956. Fifth Amendment claimed by Mr. Berry.

General Acct. No. 203, "Acct. Payable To WCM—

Fifth Amendment claimed on behalf of Mr. Marchiondo.

General Acct. No. 307, "Drawing Account Charles G. Berry 1972," GJ Ex. 956, Fifth Amendment claimed by Mr. Berry.

"Trust Account—William C. Marchiondo—Trustee," GJ Ex. 957. Fifth Amendment claimed on behalf of Mr. Marchiondo.

Trust Acct., "Marchiondo, William C., Trustee Re: " GJ Ex. 957. Fifth Amendment claimed on behalf of Mr. Marchiondo.

Trust Acct., "William C. Marchiondo—Trustee " GJ Ex. 957. Fifth Amendment claimed on behalf of Mr. Marchiondo.

Trust Acct., "Marchiondo, A.A. & W.C.," GJ Ex. 957. Fifth Amendment claimed on behalf of Mr. Marchiondo.

Trust Acct., "William Marchiondo ," GJ Ex. 957. Fifth Amendment claimed on behalf of Mr. Marchiondo.

Trust Acct., "WCM
Trust Acct.," GJ Ex. 958-9. Fifth Amendment claimed on behalf of Mr. Marchiondo (Grand Jury Tr. p. 852).

Trust Acct., "WCM Trust Account," GJ Ex. 958-10. Not clear if Fifth Amendment claimed on behalf of Mary Walters (Grand Jury Tr. pp. 852-53).

"Trust Account—W. Peter McAtee—Trustee," GJ Ex. 958-33. Fifth Amendment claimed on behalf of Mr. McAtee (Grand Jury Tr. p. 888).

As to all of the remaining trust account cards found in GJ Ex. 860-T Mr. Berry asserts the Fifth Amendment (except for GJ Ex. 958-1, 958-8, and 958-19 to which no Fifth Amendment is asserted, see Grand Jury Tr. pp. 830, 839-40, 849-51, and 877-78) on behalf of the client concerned until the same has been waived by each individual client.

II.

There are basically three types of records to which Mr. Berry has asserted the Fifth Amendment as to himself or on behalf of others. First, there are ledger account cards that reflect transactions between the law firm professional association or its predecessor and a lawyer in the firm. These include drawing accounts and loans to stockholders. Second, there are ledger account cards that record transactions of certain business investments and ventures of Mr. Marchiondo. These include etc. Finally, there are trust account cards that were kept to account for moneys held by the firm on behalf of clients.

As to the first category of ledger account cards it is Mr. Berry's position that these reflect various amounts of money borrowed from the firm by one of the lawyers and are thus private information of that individual. As to the second group of ledger account cards it is maintained that Mr. Marchiondo can assert the privilege against self-incrimination because the accounts were used by him solely for his personal business dealings, that the funds received were funds belonging personally to Mr. Marchiondo, and that all disbursements were made solely for his personal purposes. Finally, as to the privilege asserted on behalf of clients it is argued that the trust account was maintained on behalf of a client, and, accordingly, the information is the personal property of the client to which the client can take the Fifth Amendment.

Bellis v. *United States,* 417 U.S. 85 (1974), and *Couch* v. *United States,* 409 U.S. 322 (1973), are dispositive of the issues herein. Mr. Berry holds the financial records in a representative capacity, i.e., custodian of the records of Marchiondo & Berry, P.A., and its predecessors. The general rule is that the Fifth Amendment can "not be employed by an individual to avoid production of the records of an organization, which he holds in a representative capacity as custodian on behalf of the group." *Bellis, supra,* at 89. It has been the policy of the courts to limit rather than expand the scope of the privilege, thus

> [T]he Court in [*United States* v.] *White* held that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." 322 U.S., at 699.

Bellis, supra, at 90.

To admit to a self-incrimination privilege to the records herein would be contrary to the governmental right to enforce certain laws, e.g., state and federal tax laws concerning corporations and partnerships, *see Bellis, supra,* at 90-91. Moreover, the right to individual privacy concerning one's papers is not at stake here because access to the records is generally guaranteed to others in the organization by state law. *See, Bellis, supra,* at 91-92. Finally, as pointed out in *Couch* v. *United States, supra,* at 328, what is missing here is the ingredient of personal compulsion against an accused:

> It is important to reiterate that the Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States,* 228 U.S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself"; it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him," *Holt* v. *United States,* 218 U.S. 245, 252-

253 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice.

Mr. Berry's unsupported assertions that these ledger account cards are the personal property of principals in the firm or the clients is contrary to the facts. The records were maintained on law firm purchased supplies, by law firm personnel, on law firm equipment, and commingled with other law firm records in law firm storage space. The records were never in the possession of clients or firm principals, but in fact came into their very existence as records of the firm. Thus cases such as *Schwimmer* v. *United States,* 232 F.2d 855 (8th Cir. 1956), where records are placed in storage with another are easily distinguishable. *See, Couch, supra,* 333 n. 16. Just as the case where commercial bank records of checking accounts are the records of the bank and not the property of the customer, *S.E.C.* v. *First Security Bank of Utah,* 447 F.2d 166, 167 (10th Cir. 1971), the ledger account cards herein are not the property of clients or principals of the firm but rather property of the law firm itself.

As to accounts concerning private business ventures of Mr. Marchiondo, even assuming that Mr. Marchiondo's personal funds were the source of the deposits, he would have no more right to assert the Fifth Amendment privilege than any law firm client whose personal funds are channeled through the law firm's trust accounts and then applied toward the client's business. By using the law firm's bookkeeping system and bank accounts rather than a separate bank account, Mr. Marchiondo effectively relinquished any right to keep his personal affairs separate and distinct from the affairs of the law firm.

Claims of privilege other than the Fifth Amendment right against self-incrimination have been asserted as to these ledger account cards. These claims have been adequately discussed and rejected in the court's memorandum opinion filed June 23, 1975, and need not be repeated here.

III.

In the court's memorandum opinion at page 9 filed June 23, 1975, judgment was reserved on certain claims of privilege pertaining to the trust account ledger card for , GJ Ex. 958-5. The first four entries on this account card show payments by individuals other than Mr. Berry claims that the client and the persons making the payments instructed that the identity of those making the payments was to remain secret. Accordingly, he maintains that he need not produce the card to the grand jury. The law is to the contrary. *In re Richardson,* 31 N.J. 391, 157 A.2d 695 (1960); *United States* v. *Pape,* 144 F.2d 778 (2nd Cir. 1944); *Vogelstein* v. *Warden of County Jail,* 150 Misc. 714, 270 N.Y.S. 362 (S.Ct.N.Y.Cty. 1934), *aff'd without opinion,* 242 App. Div. 611, 271 N.Y.S. 1059 (1934). This ruling would be equally applicable to Mr. Berry's comments as to trust account card GJ Ex. 958-29 (see Grand Jury Tr. p. 886).

IV.

An order will be filed in accordance with the views expressed herein.

/s/ Howard Bratton
United States District Judge

(Caption Omitted in Printing)

Order

(Filed July 2, 1975)

This matter comes on for consideration of the Government's oral motion of June 27, 1975, to inspect *in camera* certain ledger account cards of the law firm of Marchiondo & Berry, P.A., and its predecessors, and to rule upon the question whether the Fifth Amendment privilege against self-incrimination can be asserted thereto; and the court having filed its memorandum opinion herein; Now, Therefore,

It Is By The Court Ordered that on July 8, 1975, at 9:30 a.m., the witness, Charles G. Berry, produce to the grand jury the following financial records:

1. Four General Ledger Account cards GJ Ex. 956.
2. Five Trust Account cards GJ Ex. 957.
3. Forty-three Trust Account cards GJ Ex. 958.
4. All Remaining Trust Account cards in GJ Ex. 860-T.

Excepting from the foregoing any records pertaining to pending federal criminal cases, and it is ordered that between the filing of this order and July 8th 1975, the witness, members of his law firm, and his bookkeeper shall have access to the foregoing records to remove or excise therefrom all such records and present them to the court; and

It Is Further Ordered By The Court that the client cards, GJ Ex. 843-C, 844-D, 845-E, 846-F, 847-G, 851-K, 852-L, 853-M, 875-II, and the box marked "Miscellaneous, Damaged in Fire, and Unidentified," GJ Ex. 861-U, all remain under subpoena and in the custody of the court.

/s/ Howard Bratton
United States District Judge

(Caption Omitted in Printing)

Order

(Filed July 9, 1975)

The Motion of the Government on behalf of the Federal Grand Jury to order the confinement of the witness Charles G. Berry pursuant to 28 U.S.C. § 1826(a) having come on for hearing, and it appearing that the witness Charles G. Berry has wilfully and without just cause refused to obey the Court's Order of July 2, 1975, to produce before the Grand Jury on July 8, 1975, certain records called for therein, and it further appearing that there has been proper Notice of these proceedings and that the witness Charles G. Berry has been given adequate notice and a fair opportunity to defend himself, and the Court having made in open court its findings of fact and conclusions of law; Now, Therefore,

It Is Ordered that the witness Charles G. Berry be, and he hereby is, Adjudged in civil contempt of the Court.

It Is The Further Order of the Court that Charles G. Berry is hereby remanded to the custody of the United States Marchal to be forthwith placed in confinement until such time as the witness is willing to obey the Order of the Court entered on July 2, 1975, to produce before the Grand Jury certain records called for therein, or until the expiration of the term of the Federal Grand Jury, including extensions, before which such refusal to comply with the Order of the Court occured, whichever comes first; provided that in no event shall such confinement exceed eighteen (18) months.

/s/ Howard Bratton
United States District Judge

(Caption Omitted in Printing)

Order

(Filed July 9, 1975)

This matter coming on for consideration upon the Motion of the witness Charles G. Berry for release on bail; Now, Therefore,

IT IS BY THE COURT ORDERED that as to this proceeding only and the Order of contempt entered herein, the witness Charles G. Berry may be released upon his own recognizance pending appeal, provided that this order in no way affects any Order of this Court in any other proceeding.

/s/ HOWARD BRATTON
United States District Judge

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 75-1306; 75-1488; 75-1497 (Consolidated)

In the Matter of the Witness CHARLES G. BERRY, *Petitioner*,
Appeal from the United States District Court for the District of New Mexico. (D.C. Nos. 75-237, 75-352 and 75-390, Civil).

Thomas E. Horn, Legal Director ACLU, New Mexico Chapter (William H. Carpenter, on the brief), for Witness Berry.

Richard S. Shine, Assistant United States Attorney (Victor R. Ortega, United States Attorney, on the brief), for the United States.

New Mexico State Bar Association (George Harris, President New Mexico State Bar Association), Amicus Curiae.

Before BREITENSTEIN, MCWILLIAMS and DOYLE, *Circuit Judges.*

Per Curiam.

These three consolidated appeals relate to orders adjudging witness Berry, an Albuquerque, New Mexico, lawyer, in civil contempt for failure to respond to a federal grand jury subpoena duces tecum. The witness is presently confined under one contempt order and is released on his personal recognizance under another. The appeal record includes over 1,000 pages of transcript, 34 sealed cartons of papers which we are asked to examine in camera, and other volum-

inous documents both sealed and unsealed. Briefs approximating 100 pages were filed on July 29 and arguments were heard on July 30. The 30-day requirement of 18 U.S.C. § 1826(b) mandates us to dispose of the appeals not later than August 2.

I.

The subpoena served on the witness April 21, 1975, required his appearance before the grand jury on April 25. Witness filed a motion to quash the subpoena on the ground that it violated his Fourth Amendment rights. The motion was denied. Witness appeared before the grand jury on April 25 but refused to produce the papers covered by the subpoena. The government sought a court order for enforcement and, with exceptions not now pertinent, witness was ordered to produce the requested papers on April 30. Witness appeared, asserted federal constitutional rights, and refused to produce the papers. On May 1 the court found witness in civil contempt and entered an order of confinement.

Case No. 75-1306 relates to the May 1 contempt order. We denied an application for a stay. On May 8 Supreme Court Justice Marshall denied a similar application; and witness was placed in custody on that day. On application of the government we made a partial remand to permit the district court to consider compliance. The court found compliance and purged witness of contempt on May 16. He was then released from custody. The government has moved to dismiss No. 75-1306 because of mootness and witness has objected. The appeal in No. 75-1306 is moot. Some of the issues raised in that appeal are also raised in Nos. 75-1488 and 75-1497 and must be considered in connection therewith.

On May 19 witness appeared before the grand jury, produced one box of subpoenaed papers, and claimed that 34 boxes of papers and three ledgers were privileged. After a series of ex parte in camera proceedings the trial court on June 23 rejected the claims of privilege and ordered witness to produce for the grand jury three ledgers and 23

of the cartons of papers which he had withheld. On July 2, the trial court found witness in civil contempt for refusal to obey the July 2 order and ordered confinement. Case No. 75-1488 is an appeal from the July 2 order. The appeal was filed July 3. The § 1826(b) 30-day limitation expires August 1. We denied a stay. Witness is presently confined under the July 2 order.

On July 2 the court also considered witness's claim that certain subpoenaed "trust account ledger cards and four general account ledger cards" were privileged under the Fifth Amendment provision against self-incrimination. The claim was rejected and witness was ordered to produce the records. On July 9 the court found witness in civil contempt for failure to comply with that order. Case No. 75-1497 is an appeal from that order. Witness is not confined thereunder because the court found that the appeal was not frivolous, and released witness on his personal recognizance.

II.

We believe that the 30-day limitation imposed by § 1826 (b) is mandatory and may not be extended by any waiver, any stay, or release on personal recognizance. Within that period an in camera inspection of the mass of submitted papers is impossible. We can do no more than hurriedly review the transcript and the complex briefs. The burden is on witness to show that he has been deprived of some constitutional rights. We consider his contentions which we believe to be controlling and reject as without merit all of his contentions not mentioned herein.

III.

Has there been a waiver by petitioner of his Fourth Amendment contention?

Generally, the witness can challenge the validity of a subpoena duces tecum for reasonableness under the Fourth Amendment by moving to quash the same pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. Initially petitioner complied with this procedural requirement, and

in the hearing that followed the trial court found the subpoena to be reasonable within the requirements of the Fourth Amendment and denied the motion. Subsequently, petitioner submitted to a contempt citation so as to challenge the validity of the subpoena duces tecum.

The matter was presented to this court soon thereafter and an expedited briefing schedule was provided. On May 19, however, petitioner produced all of his records in accordance with the subpoena. These were marked as grand jury exhibits. Having complied with the terms of the subpoena duces tecum which called for appearance before the grand jury and presentation of the records, Berry purged himself as to the first of the three contempt proceedings which are now before us.

True, he claimed evidentiary privileges in support of his refusal to allow the evidence to be given to the grand jury. Nevertheless, he had fulfilled the requirements of the subpoena duces tecum and thus he is at present in a poor position to contend that there was a violation of the Fourth Amendment. As we view it he sought to have the best of both worlds, that is, he made a show of presenting the documents in response to the subpoena duces tecum so as to get out of jail and tried, at the same time, to preserve his objections. We conclude, as did the trial court, that he did not succeed.

IV.

Assuming that there was not a waiver of Fourth Amendment rights, was the subpoena duces tecum invalid as being unreasonably broad under the Fourth Amendment?[1] We are of the opinion that the subpoena duces tecum was valid.

[1] The relevant portion of the subpoena reads as follows:

> BRING WITH YOU: for the period from January 1, 1970 to the date of this subpoena, any and all financial records of any type or description which relate, either directly or indirectly, to the financial affairs of Marchiondo & Berry, P.A., any of its predecessor or successor entities or organizations and any entities or organizations which are, either directly or indirectly, affiliated or related to said Professional Association, its predecessor or successor entities or organizations, which records should include but not be limited to any and all books, ledgers, journals or records of any type relating to income and expenses from professional fees, legal fees or any other type of income; any and all bank statements (sic), cancelled checks, deposit slips or passbooks relating to any checking or savings accounts of said organizations or entities; and any and all records or correspondence of any type, not covered by the attorney-client privilege, with any person or entity relating either directly or indirectly to any of the above records, documents and objects.

Berry contends that the grand jury's subpoena, calling for the production of evidence of virtually all of his law firm's financial transactions for a period of five and one-half years, is so overly broad that it violates his rights under the Fourth Amendment to be protected against unreasonable government searches and seizures. He does not seriously contend that the subpoena here covers an unreasonable length of time. Rather, he argues that the things sought were irrelevant and were not specified with reasonable particularity. The district court heard these contentions on Berry's motion to quash the subpoena and rejected them.

This is after all a grand jury investigation in which the government is unable to specify the documents needed. In order to carry out its investigative effort, it must use a broad scale approach. In these circumstances such a course is allowed. Branzburg v. Hayes, 408 U.S. 655 (1972).

Our court has spoken on this subject in United States v. Gurule, 437 F.2d 239 (10th Cir. 1970). That also was a grand jury investigation in which a subpoena duces tecum was issued. Subsequently, there was an indictment, trial and conviction. The subpoena had been issued to a company with which the defendant was associated, which company also sold goods to the Santa Fe Railroad. The defendant had a double agency. He was also a purchasing agent for the Santa Fe. All of the books and records of the selling company, Hills Company, were subpoenaed by the grand jury. This effort was challenged on the ground that it con-

stituted a violation of privilege against self-incrimination and illegal search and seizure. In holding that the subpoena was not overbroad, this court laid down three requirements:

1. That the subpoena may command only the production of things relevant to the investigation of the thing being pursued.

2. Specification of things to be produced must be made with reasonable particularity.

3. Production of records covering only a reasonable period of time may be required.

As in the *Gurule* case, the trial court in the case at bar found in its ruling from the bench that the requests here were reasonable in light of the nature of the investigation and the needs of the grand jury. The court also ruled that the subpoena was neither oppressive nor overbroad.

The reliance of petitioner on Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956), and In re Grand Jury Subpoena Duces Tecum, 342 F.Supp. 709 (D.Md. 1973), is not well taken. Schwimmer held that the demand for production of all of the attorney's records in the possession of a third party custodian without limitation as to time, including clients' files, was excessive. Here the subpoena calls for production of financial records of the law firm for a five-year period.

In re Grand Jury, *supra,* also turned on its particular facts; the case was decided on the proposition that relevancy was not apparent. A different ruling was given at a later time.

In view of the fact that we are considering a grand jury inquiry in which there was no prior specific knowledge as to the particular documents so as to enable the demands to be with specificity, the subpoena was in our view valid.

We have examined the trial court's ruling on the validity of the subpoena duces tecum as the same appears in the

transcript, and we are of the opinion that the court was correct in its determinations as to the validity and propriety of the subpoena duces tecum irrespective of waiver.

V.

Mr. Berry asserts a broad scale Fifth Amendment privilege to refuse to produce certain of the law firm's records. He claims the privilege for himself, for Mr. Marchiondo and for his clients.

The trial court found, in its July 2 Memorandum Opinion that the documents with respect to which Mr. Berry claims privilege were law firm documents, not the personal records either of Marchiondo or of various clients. No privilege can be claimed for these organizational records held in a representative capacity. Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944). The papers and effects which the privilege protects are those which are the private property of the person in possession, or are at least in his possession in a purely personal capacity. United States v. White, *supra.* Berry cites United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), *cert. granted,* 95 S.Ct. 824 (1975). But *Kasmir* holds only that the privilege is not defeated by a person's putting personal records in the hands of his attorney. It does not hold that privilege is created by the attorney's holding records and does not hold that records of the attorney relating to the client are protected by the client's Fifth Amendment privilege. The trial court here properly required production of the records.

VI.

Witness's remaining constitutional claims are based on the rights and privileges arising from the attorney-client relationship, and may be lumped together for consideration. Witness says that compliance with the subpoena violates his First Amendment right to freedom of association, the Fifth Amendment protection against deprivation of due process, and the Sixth Amendment rights of clients and prospective clients of representation by a lawyer. The sub-

stance of his arguments is that the subpoenaed papers are within the attorney-client privilege and are irrelevant and immaterial. He contends that enforcement of the subpoena would have a chilling effect on his and the law firm's clients, both present and prospective, and would inhibit the freedom of contract between attorney and client. He asserts that compliance would violate the attorney work-product rule and would constitute a taking of property without just compensation or due process. Finally, he says that enforcement of the subpoena would unlawfully invade his right to privacy.

In rejecting these wide-ranging claims, the court commented that many were frivolous and not made in good faith. The papers sought were financial records of the professional association of which witness was a member. These records are not privileged. *See* United States v. Hodgson, 10 Cir., 492 F.2d 1175. Relevancy and materiality are not pertinent to subpoena enforcement.

The court emphasized that the claim of privilege did not in the main relate to specific papers but was a shotgun objection to any and all papers which witness did not want to submit to the grand jury. In this regard, witness was given 19 days to specify objections to particular papers claimed to be privileged.

Time does not permit, and no good purpose would be served by, any detailed analysis of witness' claims of privilege relating to the cartons of papers and ledgers. The court carefully considered the many objections and overruled them. In so doing he carefully reviewed everything that witness offered. The general rule is that an attorney may not normally refuse to disclose the identity of a client. In re Michaelson, 9 Cir., 511 F.2d 882, 888. Nothing in the record shows any reason why the general rule should not be applied here. We are convinced that the trial court made no error affecting any substantial right of witness.

No. 75-1497 asserted a Fifth Amendment right based on certain trust account and ledger account cards. In denying

these claims the court noted that the financial records sought were those of Marchiondo & Berry, a professional association, and that witness had custody of the papers in a purely representative capacity. An individual cannot raise a Fifth Amendment claim to avoid production of records of an organization held by him in a representative capacity as custodian for the group. Bellis v. United States, 417 U.S. 85, 97-99. The Fifth Amendment privilege against compulsory self-incrimination is personal to a defendant or witness. *See* United States v. Nobles, — U.S. —, 43 L.W. 4815, 4818. We find no merit in any of witness' constitutional claims based on privilege.

VII.

Witness claims that the subpoena was the product of forbidden electronic surveillance and under 18 U.S.C. §§ 2518 (10)(a) and 3504(a)(1) he may not be required to respond.

On May 19 witness inquired whether the government had by means of electronic surveillance overheard communications between him, any member of his law firm, or any client of the firm. He did not assert that he was an "aggrieved party" within the 18 U.S.C. § 2510(11) definition. The government stated that no one in the United States Attorney's office knew of any electronic surveillance in connection with which either witness, or anyone in his law firm, or any client of the firm was an aggrieved party. Although the government did not concede that witness was an aggrieved party it volunteered to conduct a routine survey of the possibility of electronic surveillance. Witness refused to give the government identifying information as to clients but did provide that information for law firm employees on June 6.

On his grand jury appearance on June 27 witness made no § 3504(a)(1) claim. At the July 2 court hearing witness did not claim that he was an aggrieved party to illegal electronic surveillance. In entering the contempt order on that day the court found that the delay in receiving the survey results was due to witness and that "there is no suggestion from anyone, the defense or the United States, that there

is any indication whatsoever or evidence indicating the possibility of illegal electronic surveillance or mail cover." Witness made no claim before the July 2 contempt order of being an aggrieved person.

The illegal surveillance claim pertains only to the July 9 order and our case No. 75-1497. On a grand jury appearance on July 8 witness made a colorable claim of being an aggrieved person in connection with surveillance of a James Napoli in New York City. Mr. Napoli is not further identified in the record. On July 9 the government reported to the court that its survey of federal agencies established that witness was not known to be an aggrieved person in connection with any federally conducted electronic surveillance. At the July 9 hearing the court found: "There is absolutely no evidence that there was any electronic surveillance of Mr. Berry." Our attention is called to nothing in the record which questions the validity of this finding.

To raise the defense of illegal electronic surveillance in a civil contempt proceeding, a witness must show that he is an aggrieved person. See 18 U.S.C. §§ 2510(11), 2515, 2518 (10)(a)(i), 3504(a)(1), and Gelbard v. United States, 408 U.S. 41, 61 and fn. 21. An adversary proceeding is necessary only when in camera proceedings are inadequate to protect a defendant's Fourth Amendment rights. Taglianetti v. United States, 394 U.S. 316, 317; cf. United States v. Alderisio, 10 Cir., 424 F.2d 20, 23. Witness has not shown that he was a party to any intercepted wire or oral communication or a person against whom the interception was directed. Hence, he was not an aggrieved person and has no standing to raise the claim of illegal surveillance. *See* 18 U.S.C. § 2510(11) and United States v. Capra, 2 Cir., 501 F.2d 267, 281, *cert. denied*, — U.S. —.

The government assured the trial court, and in oral argument assured us, that there was no illegal surveillance of the witness. We credit the government with good faith. Certainly no fact appears in the record to impugn that good faith. When a witness claims illegal surveillance in general

and unsubstantiated terms, the government's unsworn general denial, made in response to the courts inquiry, meets the statutory requirements. *See* United States v. Stevens, 5 Cir., 510 F.2d 1101, 1106. We reject the claim of illegal electronic surveillance.

IT IS ORDERED:

(1) No. 75-1306 is dismissed.

(2) Nos. 75-1488 and 75-1497 are severally affirmed.

(3) No petition for rehearing may be filed.

(4) Issuance of mandate in each case is stayed for 30 days from this date. In the event witness applies to the United States Supreme Court for certiorari within that 30 days, the mandate is stayed until the Supreme Court disposes of the certiorari.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Office of the Clerk

August 11, 1975

MEMORANDUM TO: ALL RECIPIENTS OF OPINION NOS. 75-1306, 75-1488 and 75-1497 (Consolidated)

IN THE MATTER OF: CHARLES G. BERRY

Attached is a copy of the Court's revised page No. 3, to be substituted for the same numbered page of this Court's opinion filed on August 1, 1975, in the above cases.

Please note that the only change is the substitution of the date of June 23 for the date of July 2, on page 3, line 20.

Sincerely yours,

HOWARD K. PHILLIPS, *Clerk*

By: /s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk

Case No. 75-1306 relates to the May 1 contempt order. We denied an application for a stay. On May 8 Supreme Court Justice Marshall denied a similar application; and witness was placed in custody on that day. On application of the government we made a partial remand to permit the district court to consider compliance. The court found compliance and purged witness of contempt on May 16. He was then released from custody. The government has moved to dismiss No. 75-1306 because of mootness and witness has objected. The appeal in No. 75-1306 is moot. Some of the issues raised in that appeal are also raised in Nos. 75-1488 and 75-1497 and must be considered in connection therewith.

On May 19 witness appeared before the grand jury, produced one box of subpoenaed papers, and claimed that 34

boxes of papers and three ledgers were privileged. After a series of ex parte in camera proceedings the trial court on June 23 rejected the claims of privilege and ordered witness to produce for the grand jury three ledgers and 23 of the cartons of papers which he had withheld. On July 2, the trial court found witness in civil contempt for refusal to obey the June 23 order and ordered confinement. Case No. 75-1488 is an appeal from the July 2 order. The appeal was filed July 3. The § 1826(b) 30-day limitation expires August 1. We denied a stay. Witness is presently confined under the July 2 order.

On July 2 the court also considered witness's claim that certain subpoenaed "trust account ledger cards and four general account ledger cards" were privileged under the Fifth Amendment.

JULY TERM—August 11, 1975

Before Honorable JEAN S. BREITENSTEIN, *Senior Judge*, Honorable ROBERT H. MCWILLIAMS and Honorable WILLIAM E. DOYLE, *Circuit Judges*

IN THE MATTER OF: CHARLES G. BERRY, *Petitioner.*

Nos. 75-1306; 75-1488; 75-1497

These cases are before the court on petitioner's motion for admission to bail pending determination of his petition for certiorari.

The court finds and concludes:

1. Section 1826(b), Title 28, U.S.C., violates no provision of the Constitution of the United States.
2. The provision of § 1826(b) for decision within 30 days of an appeal from an order of confinement is mandatory on the court of appeals.
3. The August 1, 1975, decision of the court does not conflict with the decision of the court of appeals of any circuit.
4. The contentions of petitioner are frivolous.
5. A petition for certiorari, if filed, will be merely for delay.

Accordingly, it is ordered that the motion is denied.

HOWARD K. PHILLIPS, *Clerk*

By: /s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk

AMERICAN BAR ASSOCIATION

CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.[1] A client must feel free to discuss whatever he wishes

[1] *See* ABA CANONS 6 and 37 and *ABA Opinion* 287 (1953).

"The reason underlying the rule with respect to confidential communications between attorney and client is well stated in MECHAM ON AGENCY, 2d Ed., Vol. 2, § 2297, as follows: 'The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged;—that the attorney shall not be permitted, without the consent of his client,—and much less will he be compelled—to reveal or disclose communications made to him under such circumstances.'" *ABA Opinion* 250 (1943).

"While it is true that complete revelation of relevant facts should be encouraged for trial purposes, nevertheless an attorney's dealings with his client, if both are sincere, and if the dealings involve more than mere technical matters, should be immune to discovery proceedings. There must be freedom from fear of revealment of matters disclosed to an attorney because of the peculiarly intimate relationship existing." Ellis-Foster Co. v. Union Carbide & Carbon Corp., 159 F. Supp. 917, 919 (D.N.J. 1958).

Cf. ABA Opinions 314 (1965), 274 (1946) and 268 (1945).

with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.[2] A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure,[3] when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyear to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his

[2] "While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer. Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960).

Cf. ABA Opinion 150 (1936).

[3] "Where . . . [a client] knowingly and after full disclosure participates in a [legal fee] financing plan which requires the furnishing of certain information to the bank, clearly by his conduct he has waived any privilege as to that information." ***ABA Opinion*** 320 (1968).

clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship.[4] Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should

[4] "The lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in turning against his client by exposing injurious evidence entrusted to him. . . . [D]oing something intrinsically regrettable, because the only alternative involves worse consequences, is a necessity in every profession." WILLISTON, LIFE AND LAW 271 (1940).

Cf. ABA Opinions 177 (1938) and 83 (1932).

avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.[5] Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates.[6] Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another,[7] and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.[8] Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets.[9] A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether

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[5] *See* ABA Canon 11.

[6] *See* ABA Canon 37.

[7] *See* ABA Canons 6 and 37.

"[A]n attorney must not accept professional employment against a client or a former client which will, or even *may* require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment . . . ." *ABA Opinion* 165 (1936).

[8] *See* ABA Canon 37.

"Confidential communications between an attorney and his client, made because of the relationship and concerning the subject-matter of the attorney's employment, are generally privileged from disclosure without the consent of the client, and this privilege outlasts the attorney's employment. *Canon 37.*" *ABA Opinion* 154 (1936).

[9] *Cf. ABA Opinion* 266 (1945).

termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

Disciplinary Rules

DR 4-101 Preservation of Confidences and Secrets of a Client.[10]

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.[11]

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[10] *See* ABA Canon 37; *cf.* ABA Canon 6.

[11] "§ 6068 . . . It is the duty of an attorney:

. . . .

"(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." Cal. Business and Professions Code § 6068 (West 1962). Virtually the same provision is found in the Oregon statues. Ore. Rev. Stats. ch. 9 § 9.460(5).

"Communications between lawyer and client are privileged (Wigmore on Evidence, 3d Ed., Vol. 8, §§ 2290-2329). The modern theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal adviser (*ibid.*, § 2290, p. 548). The privilege applies to communications made in seeking legal advice for any purpose (*ibid.*, § 2294, p. 563). The mere circumstance that the advice is given without charge therefor does not nullify the privilege (*ibid.*, § 2303)." ABA Opinion 216 (1941).

"It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client . . . ." *ABA Opinion* 155 (1936).

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself [12] or of a third person,[13] unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.[14]

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.[15]

(3) The intention of his client to commit a crime [16] and

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[12] *See* ABA CANON 11.

"The provision respecting employment is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client's business, to his own advantage or profit (7 C.J.S., § 125, p. 958; Healy v. Gray, 184 Iowa 111, 168 N.W. 222; Baumgardner v. Hudson, D.C. App., 277 F. 552; Goodrum v. Clement, D.C. App., 277 F. 586)." *ABA Opinion* 250 (1943).

[13] *See ABA Opinion* 177 (1938).

[14] "[A lawyer] may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client (People v. Gerold, 265 Ill. 448, 107 N.E. 165, 178; Murphy v. Riggs, 238 Mich. 151, 213 N.W. 110, 112: Opinion of this Committee, No. 91)." *ABA Opinion* 202 (1940).

Cf. ABA Opinion 91 (1933).

[15] "A defendant in a criminal case when admitted to bail is not only regarded as in the custody of his bail, but he is also in the custody of the law, and admission to bail does not deprive the court of its inherent power to deal with the person of the prisoner. Being in lawful custody, the defendant is guilty of an escape when he gains his liberty before he is delivered in due process of law, and is guilty of a separate offense for which he may be punished. In failing to disclose his client's whereabouts as a fugitive under these circumstances

the information necessary to prevent the crime.[17]

(4) Confidences or secrets necessary to establish or collect his fee [18] or to defend himself or his em-

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the attorney would not only be aiding his client to escape trial on the charge for which he was indicted, but would likewise be aiding him in evading prosecution for the additional offense of escape.

"It is the opinion of the committee that under such circumstances the attorney's knowledge of his client's whereabouts is not privileged, and that he may be disciplined for failing to disclose that information to the proper authorities. . . ." *ABA Opinion* 155 (1936).

"We held in *Opinion* 155 that a communication by a client to his attorney in respect to the future commission of an unlawful act or to a continuing wrong is not privileged from disclosure. Public policy forbids that the relation of attorney and client should be used to conceal wrongdoing on the part of the client.

. . . .

"When an attorney representing a defendant in a criminal case applies on his behalf for probation or suspension of sentence, he represents to the court, by implication at least, that his client will abide by the terms and conditions of the court's order. When that attorney is later advised of a violation of that order, it is his duty to advise his client of the consequences of his act, and endeavor to prevent a continuance of the wrongdoing. If his client thereafter persists in violating the terms and conditions of his probation, it is the duty of the attorney as an officer of the court to advise the proper authorities concerning his client's conduct. Such information, even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant, is not privileged from disclosure. . . ." *ABA Opinion* 156 (1936).

[16] *ABA Opinion* 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed."

See ABA *Opinion* 155 (1936).

[17] *See* ABA CANON 37 and *ABA Opinion* 202 (1940).

[18] *Cf. ABA Opinion* 250 (1943).

ployees or associates against an accusation of wrongful conduct.[19]

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

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[19] *See* ABA CANON 37 and *ABA Opinions* 202 (1940) and 19 (1930).

"[T]he adjudicated cases recognize an exception to the rule [that a lawyer shall not reveal the confidences of his client], where disclosure is necessary to protect the attorney's interests arising out of the relation of attorney and client in which disclosure was made.

"The exception is stated in MECHEM ON AGENCY, 2d Ed., Vol. 2, § 2313, as follows: 'But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform. So if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.'

"Mr. Jones, in his COMMENTARIES ON EVIDENCE, 2d Ed., Vol. 5, § 2165, states the exception thus: 'It has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue. In such cases, if the disclosure of privileged communications becomes necessary to protect the attorney's rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. It would be a manifest injustice to allow the client to take advantage of the rule exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy.'" *ABA Opinion* 250 (1943).

18 U.S.C. § 3333

§ 3333. *Reports*

(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report—

(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or

(2) regarding organized crime conditions in the district.

(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise provided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that—

(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (a) of section 3332 and is supported by the preponderance of the evidence; and

(2) when the report is submitted pursuant to paragraph (1) of subsection (a) of this section, each person named therein and any reasonable number of witnesses in his behalf as designated by him to the foreman of the grand jury were afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (2) of subsection (a) of this section, it is not critical of an identified person.

(c) (1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be filed as a public record or be subject to subpena or otherwise made public

(i) until at least thirty-one days after a copy of the order are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or (ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3) of subsection (c) of this section. The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publication may be punished as contempt of the court.

(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously, or unnecessarily, such answer shall become an appendix to the report.

(3) Upon the expiration of the time set forth in paragraph (1) of subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report.

(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing

of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpena or public inspection during the pendency of such criminal matter, except upon order of the court.

(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may be extended by the district court beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

(f) As used in this section, "public officer or employee" means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.

Added Pub.L. 91-452, Title I, § 101(a), Oct. 15, 1970, 84 Stat. 924.

28 U.S.C. § 1826

Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other ma-

terial, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Added Pub.L. 91-452, Title III, § 301(a), Oct. 15, 1970, 84 Stat. 932.